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# PITTSBURGH REPORTS:

CONTAINING

## C A S E S

DECIDED BY THE

### FEDERAL AND STATE COURTS OF PENNSYLVANIA.

CHIEFLY AT THE CITY OF PITTSBURGH.

*Originally published in the Pittsburgh Legal Journal.*

EDITED, WITH PARALLEL REFERENCES,

BY BOYD CRUMRINE.

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VOL. II.

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PHILADELPHIA:  
JOHN CAMPBELL & SON,  
LAW BOOKSELLERS, PUBLISHERS AND IMPORTERS,  
No. 740 Sansom Street.  
1872.

KFP  
52  
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P52

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**JOHN CAMPBELL & SON,**

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**HENRY B. ASHMEAD, BOOK AND JOB PRINTER,**

1102 & 1104 Sanson Street, Philadelphia.

# COURTS IN ALLEGHENY COUNTY.

1859—1865.

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## UNITED STATES CIRCUIT COURT.

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HON. WILSON McCANDLESS, Associate.

## UNITED STATES DISTRICT COURT.

### JUDGE.

HON. WILSON McCANDLESS.

## DISTRICT COURT.

HON. MOSES HAMPTON, . . . . President Judge.

HON. H. W. WILLIAMS, . . . . Assistant Judge.

## OYER AND TERMINER, QUARTER SESSIONS, ORPHANS' COURT, AND COURT OF COMMON PLEAS.

HON. WILLIAM B. McCLURE, (to March, 1862,) President Judge.

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HON. JOHN W. MAYNARD, (to Dec. 1859,) Assistant Judge.

HON. THOMAS MELLON, (from Dec. 1859,) “ “

HON. DAVID RITCHIE, (from Sept. 1862 to Dec. 1862,) “ “

HON. EDWIN H. STOWE, (from Dec. 1862,) “ “



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REPORTS OF CASES  
DECIDED BY  
THE FEDERAL AND STATE COURTS IN  
PENNSYLVANIA.

FROM THE PITTSBURGH LEGAL JOURNAL.

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*In the Quarter Sessions of Allegheny County.*

IN RE EXTENSION OF PENNSYLVANIA AVENUE.

(Vol. VII., p. 1. 1859.)

1. The power of the legislature to lay out a public street cannot be questioned, as it is a proper exercise of the right of eminent domain for the public good.
2. Where an Act of Assembly grants the right of appeal and a hearing, in the case of a report by viewers appointed by the Quarter Sessions, estimating benefits, and apportioning and assessing damages, occasioned by the opening of a public street, it is to be construed as meaning an appeal to the court and for hearing before the court. The case is not of that class contemplated by the Constitution in which the right of trial by jury is secured.
3. If the street be laid out by force of the Act of Assembly alone, and the Act be for a public purpose, all persons interested are bound to take notice of its provisions.
4. Where the act prescribes that the viewers appointed by the court shall "proceed with as little delay as possible to view and examine the ground proposed for the extension of said avenue;" and after apportioning damages, &c., "shall file the said apportionment and assessment in the said court," it is not an essential requisite in all such cases that the report should be filed at the next term of the court.
5. The presumption of law is in favor of the correctness of the viewers' report.
6. If the street be laid out and extended, not by virtue of the city's corporate



## 2 IN RE EXTENSION OF PENNSYLVANIA AVENUE.

powers, but by direct legislation, and the act authorizes the viewers to apportion and assess the damages upon and among the individuals benefited, fairly and equitably, the viewers are not confined in the apportionment, &c., to property within the city limits.

A SUFFICIENT statement of facts in this case is given in the opinion of the court.

The case was argued by *A. W. Foster*, City Solicitor, and *John Mellon* for the petitioners, and by Messrs. *Kuhn, Craft, Woods, McClowry* and *Bakewell*, for exceptants.

The opinion of the court was delivered July 7, 1859, by

MAYNARD, A. J.—The first section of the Act of 4th of May, 1857, provides: "That Pennsylvania avenue, in the City of Pittsburgh, be and the same is hereby extended, agreeably to the provisions hereinafter mentioned, from the angle in said avenue immediately east of Chatham street, to the intersection of Fifth and Ross streets, so that the southern line of said avenue, if extended in a straight line, would strike the northeast corner of the court-house lot, at the point of intersection of the lines of Ross and Fifth streets, and the said extension shall have the same width that said avenue now has east of the angle aforesaid."

This statute is of a public character, and by it the legislature have in express terms extended Pennsylvania avenue, between the points named, and definitely laid out and designated the lines of the avenue or street so extended. The power of the legislature to lay out this street cannot be questioned, as it is the proper exercise of the right of eminent domain for the public good.

The second section of the act provides for the appointment of viewers by the Court of Quarter Sessions of Allegheny county, on petition, &c., and defines the powers and duties of the viewers.

But, before proceeding to the consideration of the various provisions of this section, it will be proper to turn our attention to the provision of section sixth, of the same act, in order more clearly to understand the powers and duties of the viewers appointed under section second, as well as the time and mode of their exercise.

Section sixth provides that "the court aforesaid, on the application of ten or more citizens for the opening of the said avenue, shall notify the recording regulator of the city of Pittsburgh, to proceed to lay out and mark the extension of said avenue on the ground, who shall make an accurate map or plan of the same, exhibiting the lots, streets, houses, &c., over which the said avenue shall be extended, with the names of the owners of lots marked thereon; which plan shall be filed in the office of the regulator aforesaid, for the inspection of the citizens, a copy of which shall be furnished to the viewers—and all the expenses of this plan shall be defrayed by the city of Pittsburgh.

We will now go back to the further consideration of the provisions of section second, which provides, that the Court of Quarter Sessions of Allegheny county, on being petitioned by ten or more citizens of Pittsburgh, for the opening of the street named in the preceding section, shall, and they are hereby authorized to appoint six discreet and disinterested citizens, &c., "who, after being duly sworn or affirmed, shall proceed with as little delay as possible to view and examine the ground proposed for the extension of the above named avenue; the said viewers or any four of them shall inquire what damages any individual or individuals shall or may sustain by the opening or extending said avenue as a public highway, and shall make a fair estimate of the same. And they shall inquire to whom the opening of said avenue shall be a benefit, and they shall apportion and assess the amount of damages so found upon and among the individuals so benefited, fairly and equitably, in proportion to the benefit received therefrom. And the said viewers, or a majority, shall file the said apportionment and assessment in the said court, to which any party conceiving himself or herself aggrieved, shall have the right of appeal and hearing, and on the said assessment and apportionment being approved by the said court, it shall be entered and recorded at large on the docket thereof, and shall bind and conclude all parties owning or claiming to own the property adjudged by said viewers to be so benefited by the opening of the said avenue or highway, &c., *provided*, that the said report of viewers to the court shall not be approved without the said court

#### 4 IN RE EXTENSION OF PENNSYLVANIA AVENUE.

first having given at least ten days notice of the time, in two daily newspapers published in the City of Pittsburgh."

Section three provides that in case of inability or neglect of any of the viewers to attend, the court may appoint others to supply their places.

The first petition for the appointment of viewers, was presented to the court at the June Term, 1857, and on the 18th July, 1857, viewers were appointed by the court, with the following direction at the foot of the order:—

"To proceed for the purpose of their appointment in pursuance of the directions of the Act of Assembly above referred to," (being the act by which this proceeding was authorized.)

At the October Term following, a second petition, in pursuance of the provisions of the sixth section, for the opening of the said street, was presented to the court, whereupon the court made the order required by the act, and directed notice of the same to be served on the Recording Regulator of the City of Pittsburgh, in which that officer was directed to perform the duties required of him by said act. This order was made by the court on the 3d of October, 1857.

The viewers report to the court, that after being duly sworn, and furnished by the Recording Regulator with a plan of the extension of said avenue, exhibiting the lots, streets, houses, &c., they proceeded to examine, &c., and after numerous meetings and examinations of the premises, &c., &c., and then state the assessments, in detail, showing the manner in which apportionments had been made among those whose property had been assessed as benefited. This report of the viewers was filed in court on the 7th of August, 1858.

And upon the 28th of the same month, the court made an order for publication, as required by the *proviso* to the second section of said act. The order is as follows :

"In the matter of the extension of Pennsylvania avenue."

"The report of the viewers appointed by the Court of Quarter Sessions of Allegheny county, to view and examine the ground proposed for the extension of Pennsylvania avenue, having been filed, the court direct notice to be given in two daily newspapers, published in the City of Pittsburgh, that said report will be ap-

proved unless excepted to within ten days from the date of this notice."

This order of court having been published as required by the act, the parties now complaining appeared in court within ten days after the publication, and by their counsel severally filed exceptions; some to the amount of damages assessed in their favor for property taken, and others to the amounts assessed against them as benefits. It appears from the report that two hundred and eighty persons are assessed and charged as being benefited, and of these only fourteen except and complain.

Most of those who have filed exceptions have likewise put the same in the form of an appeal, under that clause in the second section of the act which says, "the said viewers, or a majority, shall file said apportionment and assessment in the said court, to which any party conceiving himself, &c., aggrieved, shall have the right of appeal and a hearing;" and under such appeal the party claims the right of a trial by jury. As this is not of that class of cases contemplated by the Constitution, in which the right of trial by jury is secured, but a mere inquest between the public and individuals, it is no infringement of the Constitution for the legislature to provide for such a mode of assessment as this, and to make the same conclusive of the right of the individual. These inquests were known to the common law long before the birth of our Constitution, and are the legitimate exercise of sovereign power, particularly so when exercised in the right of eminent domain or the assessment of taxes.

No one thinks of claiming the right of trial by jury when the assessor or county commissioners (as an inquest) assess us with taxes for public purposes. See 1 Barr 314; Duquesne Way, 5 Binn. 204; City Dist. Case, 2 W. & S. 320; 8 Watts 293; 7 Barr 175; 8 W. & S. 74.

We, therefore, treat the appeals in these cases as to the court and for a hearing before the court, and for that purpose we will permit the party alleging he is "aggrieved" to make his appeal or file exceptions as he or his counsel may think proper, and without prejudice as to form.

The first exceptions are to the regularity of the proceedings.

1. That notice of the meeting of the viewers to assess the

## 6 IN RE EXTENSION OF PENNSYLVANIA AVENUE.

damages and apportion them among those who are assessed as being benefited, was not given.

2. That the report of the viewers was not filed in time, as required by law and practice in like cases, and that the proceedings, being thus irregular, are illegal.

The remaining exceptions are to the merits, and we will first dispose of these questions in reference to the regularity of the proceedings.

This street, as we have seen, was extended and laid out by force of the statute alone, and being for a public purpose, all parties interested were bound to take notice of its provisions.

The act makes it the duty of the court to appoint the viewers, and requires them to proceed, with as little delay as possible, to perform the duties enjoined, and to file a report of their proceedings in court.

The rights of all parties interested are thus protected by the proviso, which says, "the said report of the viewers to the court shall not be approved without the said court first having given at least ten days' notice of the time, in two daily newspapers published in the city of Pittsburgh." This is all the notice required to be given by the Act of Assembly in this case. That this notice was given and was effectual, is sufficiently evidenced by the publication and the fact that the exceptions now under consideration were filed within ten days after the publication. The parties now have their day in court, and natural justice requires that notice and day should be given before parties are bound and concluded by the action of the court in all cases.

But it is further objected that the report of the viewers was not filed in time; that it should have been filed at the next term after their appointment; that, according to the course of practice, whatever process is issued or order made by the court, should be returned to the next term of the court. This argument holds good with reference to the process and officers of the court.

This Act of Assembly is silent in reference to the time in which the viewers are to perform their duties and make return; they are required by the act "to proceed with as little delay as possible to view and examine the ground proposed for the extension of said avenue." But it will be borne in mind that they

could not proceed with their work until petition should be presented to court as required by the sixth section, and for the court to notify the recording regulator of the city to perform certain duties required of him, among which was to make an accurate map or plan of the ground, exhibiting the lots, houses, streets, &c., a copy of which should be furnished to the viewers, and without which they could not perform their duties. The work necessarily required a good deal of time.

We find, on looking at the record, that the petition for this purpose was not presented until the third of August, 1857. Within what time the map or plan was completed by the recording regulator, and furnished to the viewers, does not appear. It seems very certain that this delay was not injurious to the exceptants, as it postponed the day of payment, and without interest.

The statute required these acts and duties to be performed. No time was prescribed. We presume the viewers "proceeded with as little delay as possible," under the circumstances; and if so, they complied with the requirements of the law under which they acted; and in so doing we do not think they were in error, and the exceptions to the regularity of the proceedings are overruled.

We will now consider the remaining exceptions, which are to the merits, and which we treat as an appeal to the court within the meaning of this statute.

The exceptions filed by those among whom the damages found have been apportioned, and who have been assessed as benefited by the opening of said street as a highway, may be comprised in the following specifications:

1. The apportionment and assessment are unequal, excessive and unjust.
2. That the opening of the street is not a benefit to exceptants, but a detriment.
3. That the property of some of the exceptants, so assessed, is not within the city limits.

Before proceeding to examine severally and minutely these exceptions, let us look briefly at the tribunal whose acts and decisions we are to review.

This act required the court to "appoint six discreet and disinterested citizens, selected from the inhabitants of any portion of the city," not personally or directly interested in the extension of this street. When so selected and appointed, the law required they should be duly sworn or affirmed, and when thus qualified, they should perform the duties enjoined.

No exception is taken to the inquest thus constituted. We have, then, the judgment and fidelity of this court in selecting and appointing viewers. They are citizens well acquainted with the ground to be viewed, of sound judgment, entirely disinterested and of unquestioned integrity.

It cannot be said that they did not devote all the time necessary to inform their judgment. They have returned the result of their deliberation and judgment, solemnly made in a report in the nature of a verdict, which we are now asked to set aside for the alleged reasons "that the apportionment and assessment are unequal, excessive and unjust; that the opening of the street is not a benefit, but a detriment to them; and that that portion of the property assessed as benefited, not within the city limits, is without the authority of law."

If these allegations and exceptions are true in point of fact, the viewers, to speak in the mildest terms of their report, have committed a gross mistake, which ought to be speedily corrected. It becomes, therefore, a matter of the first moment to ascertain the truth of the facts embodied in the exceptions; and for that purpose we must look carefully into the evidence furnished by the parties excepting.

1. Detrich Tomhills says, in his affidavit, that he is acquainted with the property of several of the exceptants, naming them, and that "their property is so far out, it would receive no benefit"—property used for dwelling-houses.

2. William Perkins, a witness, says, "my own opinion is, that the people in the neighborhood of Alex. Miller and J. Tomer would not be benefited by the opening."

On cross-examination, he says, "I have not paid particular attention to this subject."

3. E. P. Jones says: "I don't think the increase of property out at A. Miller and J. Tomer's would be scarcely perceptible

by the extension ; property in Fourth street would be decreased. Can't tell the quantity of land owned by them, or the value of it."

Cross-examined, he says, " I rather think if I had been a viewer I should have given the subject more consideration."

4. Jacob Tomer says " he knows the property ; thinks it not benefited ; is used for private dwellings : the benefit is altogether in favor of Fifth street. I have property assessed \$450 ; can't tell what it is worth."

William Bougher says he does not think the opening would benefit the property of Yost Ruch.

These are all the depositions taken and evidence offered to satisfy us that the exceptions are well founded, or that the report ought to be set aside.

The presumption of law is in favor of the correctness of the report, and the evidence afforded fails to satisfy us that the viewers have erred in judgment in assessing and apportioning the damages as required by the Act of Assembly.

We at first had considerable doubt as to the authority of the viewers to assess and apportion the damages on property as benefited outside the city limits. But further reflection has satisfied us, that this statute confers that authority upon them.

This street was not extended by virtue of the corporate powers of Pittsburgh, but by direct legislation. The court of the county appoint the viewers. The act says they shall inquire what damages any individual shall or may sustain by the opening of the street, and make a fair estimate of the same, and shall inquire to whom the opening of the said avenue shall be a benefit ; and they shall apportion and assess the amount of the damages so found upon and among the individuals so benefited fairly and equitably, in proportion to the benefit received therefrom.

As far, therefore, as relates to the question now before us, it is to be treated without reference to the city limits, and if the viewers have apportioned and assessed the amount of damages so found upon and among the individuals so benefited, fairly and equitably, it is all the law requires ; and the parties so assessed have no more right to complain of injustice than they would have had if they constituted the whole public, for whose exclusive use



this highway was opened. It is taking private property for public use, as well for those who are assessed or benefited as those whose lands are appropriated. In the one case, the act of taking is direct, in the other, the assessment of a sum of money as a tax for the same object; and in both cases the parties receive that just and adequate compensation, in the enjoyment of the use of a public highway and the increased value of property, which is contemplated in and secured by the constitution of this Commonwealth.

The fifth section of this act provides that the expense of viewing and assessing damages, and all other incidental matters not fully provided for in the act, shall be governed by the general road laws of this Commonwealth; and the sixth section provides, that "all the expenses of the map or plan, furnished to the viewers, shall be defrayed by the city of Pittsburgh."

The viewers report the gross amount of damages awarded for the land, &c., taken by the extension of the avenue to be \$27,400, and to this sum they add the sum of \$983, which they "assess for expenses of the viewers plans, of benefits," &c., making the sum of \$28,383, which they apportion upon and among those persons named as benefited. In adding these expenses, \$983, the viewers were in error. The act makes other provisions for the payment of these expenses. It is a plain mistake, appearing upon the face of the report, and we therefore recommit the report to the viewers with direction to abate the expenses, or in other words, to apportion the sum of \$27,400, upon and among those assessed as benefited, and make report thereof to the court with as little delay as possible. All exceptions not specifically mentioned are overruled.

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*In the Quarter Sessions of Allegheny County.*

IN RE CITIZENS' PASSENGER RAILWAY COMPANY.

(Vol. VII., p. 9. 1859.)

1. The principle of law authorizing the taking of private property for public use, upon compensation made or adequate security given operates, in like

circumstances, upon the property of corporations with equal force, as upon that of individuals.

2. The grant of the franchise of a ferry, bridge, turnpike, or railway, is not in its nature exclusive, so as to preclude the State from interfering with it, by the creation of another similar franchise tending materially to impair its value. The charter is not a contract standing above and beyond legislative interference, nor a grant of the fee simple in the soil, but a mere easement; and the legislature has full power to grant as many more easements, on the same territory, as public convenience may require, always making indemnity for damage done to those corporations which were the first objects of its bounty, or the recipients of antecedent grants.
3. The legislature has no authority to barter away its essential attributes of sovereignty: and each legislature should assemble with the same measure of sovereign power which was held by its predecessors.

THIS case was argued by *O. H. Rippey*, for petitioners, and by *Geo. P. Hamilton*, *D. D. Bruce*, and *Wm. B. Negley* for respondents.

The following opinion was delivered July 18, 1859, by

**McCLURE, P. J.**—The proceedings in this and other cases now before us, arise under the provisions of a recent Act of Assembly, incorporating the Citizens' Passenger Railway Company of Pittsburgh. Corporations such as these originate from motives of private and personal advantage for the sake of pecuniary gain, direct or incidental, real or fancied, to the corporators or stockholders. The public interest is not the motive to embark in them, but the public reaps a collateral advantage, when public convenience is one result of the enterprise.

We consider the public has an interest in good roads of any kind, and that the public will have bad roads on this great thoroughfare until the controversies of these corporations cease. There is an end of repair on all the line of road this passenger railway will travel, which will not be resumed pending these controversies. In this the public is an interested sufferer. In all these important cases this court is compelled by law to make contracts for men who are far better qualified to make them for themselves.

On the 22d of March, 1859, an Act of Assembly was approved, entitled, An Act to incorporate "The Citizens' Passenger Rail-

way Company of the city of Pittsburgh." Pamphlet Laws of 1859, page 203. The first section of the act indicates the style and title of the corporation, and the starting point, route, and terminus of the road. Section 10 is in these words: "That before the said railway company shall use or occupy any portion of any turnpike, plank road, bridge, or street, or road of any borough, if the said railway company and said turnpike, plank road, or bridge company, or councils of any borough, cannot agree upon the terms for the use thereof within thirty days from the organization of the said company, that either party may apply, by petition, to the Court of Quarter Sessions of Allegheny county, setting forth the facts, and praying the court to appoint a time for the hearing of the parties, not more than twenty days from the filing of the said petition, of which time and place the opposite party shall have at least ten days notice, and the court shall immediately after hearing the said parties, proceed to fix and adjudge the rate of compensation to be allowed and paid by said company, for the use of such turnpike, plank road, bridge, or street, and the terms on which it shall be used, and the mode and manner in which the same shall be kept up by the respective parties; which judgment shall be and remain final and conclusive between the parties: Provided further, that the company shall have power to make such changes in the grade of the turnpike and plank road as may be required to enable them to use their railway with ease and convenience." Section 16 directs when the railway shall be commenced and completed.

This railway route is from the intersection of Market and Fifth streets to Liberty street, thence along and across said street to Cecil's alley, thence along said alley to Penn street, thence along Penn street to the Greensburg and Pittsburgh turnpike road, thence along said road to Butler street in the borough of Lawrenceville, thence along said street to the Lawrenceville and Sharpsburg plank road, thence by said plank road, and by way of Sharpsburg bridge into the borough of Sharpsburg, a distance of between five and six miles. Here we have the city of Pittsburgh, the turnpike road, the borough of Lawrenceville, the plank road, the Sharpsburg bridge, the borough of Sharpsburg, and the petitioners—seven corporations. This Act of Assembly confers

upon the court novel and extraordinary powers, with correspondent responsibilities annexed to their exercise. "The court shall fix and adjudge the rate of compensation to be allowed and paid by said company for the use of such turnpike, plank road, bridge, or street, and the terms on which it shall be used, and the mode and manner in which the same shall be kept up by the respective parties, which judgment shall be final and conclusive between the parties."

The portion of the turnpike over which the passenger railway will pass, is from the city limit to the mouth of Butler street, in the borough of Lawrenceville, about sixteen feet in width, and twenty-three hundred feet in length.

The counsel for this road allege that the act incorporating the Citizens' Passenger Railway is unconstitutional. This comprises all the objections made by the turnpike road company. Is the act constitutional? The position assumed is that the charter of the Greensburg and Pittsburgh Turnpike Company is a contract which no future legislature can impair, and that its franchise is exclusive and above and beyond legislative interference. A summary answer to such objections might be that the power which granted the charter, reserved the power to revoke it. But what is closer to the point, the legislature expressly declared that "if the legislature should at any time after the year one thousand eight hundred and thirty-six, think proper to take possession of the road or any part thereof," it can be done in the mode described, and thereupon all the right, title, and interest of the road shall cease. See charter of this road, sec. 25; approved 24th of February, 1806. The legislature might, under this section, take the road, or any part of it, in the manner described, and abolish the toll on the whole road or any part of it in the manner pointed out by the terms of the charter itself.

The legislature may invest a corporate body or individual with the privilege of taking private property for public use, upon compensation made or adequate security given, before the property is taken; and it cannot be shown that the rights of corporations are any more sacred in any legal or constitutional view than those of individuals. The same turnpike took private property for public use, in a strip or line three or four hundred

miles long, from Pittsburgh to Philadelphia. I shall make no reference to the right of "eminent domain," in Pennsylvania; it is familiar to popular apprehension as well as the professional mind.

In regard to the position that the grant of the franchise of a ferry, bridge, turnpike or railroad is in its nature exclusive, so that the state cannot interfere with it by the creation of another similar franchise, tending materially to impair its value, it is, with great deference, submitted that an important distinction should be observed between those powers of government which are essential attributes of sovereignty, indispensable to be always preserved in full vigor, such as the power to create revenue for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for public uses and the like; and those powers which are not thus essential, such as the power to alienate the lands and other property of the state, and to make contracts of service, or of purchase and sale and the like.

Powers of the former class are essential to the constitution of society, as without them no political community can well exist, and necessity requires that they should continue unimpaired. They are intrusted to the legislature to be exercised, and not to be bartered away, and it is indispensable that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature disabling itself from the future exercise of powers intrusted to it for the public good, must be void, being in effect a covenant to desert its paramount duty to the whole people: Greenleaf's note, Cruise, vol. 2, title 27, section 29.

I consider that the constitutionality of acts of the legislature like this we are considering, has ceased to be a question. A multitude of cases in many states has put the question to rest. A few of the more prominent authorities may be referred to: Bald. 2282; Ames' Railway Cases 86, 145, 235, 325, 503, 540; 6 How. 507; 3 Kelly (Ga.) 31; 8 N. H. 88; 10 Id. 369; 11 Id. 369; 15 Vt. 98; 3 Casey 354; 6 Whart. 43; see also Redfield on Railways, sec. 8, title "Corporate Franchises Con-

densed:" and what is more to the purpose, our own Supreme Court recognise the principle in all those cases which involve it.

Here is Butler street, in Lawrenceville, on which (if it be on it now) the old Pittsburgh and Butler pike has an easement; Lawrenceville has an easement; the plank road has an easement; the Citizens' Passenger Railway has an easement, but no fee simple in the soil. All these easements are mere creatures of the legislature, created by a constitutional invasion of individual or private rights, and the legislature has full power and vigor to grant as many more easements in all future time as public convenience and necessity may require, always making indemnity for damage done to those corporations which were the first objects of its bounty, or the recipients of antecedent grants.

So far as regards the objection of the respondents that this court has no jurisdiction, the petition recites what in the words of the Act of Assembly confers it. We are of opinion that the act is constitutional, and the court has jurisdiction.

ORDER.—The court adjudges for the use of the Citizens' Passenger Railway, for the purpose of its road, sixteen feet in width on the Greensburg and Pittsburgh turnpike road, beginning at Clymer street, and running thence along said turnpike to Butler street, in the borough of Lawrenceville, a distance of twenty-five hundred and eighty feet, or thereabouts. And the terms on which said turnpike road shall be used, and the mode and manner in which the same shall be kept up by the respective parties, is as follows: The Citizens' Passenger Railway to use and occupy sixteen feet in width of the Greensburg and Pittsburgh turnpike road, and to keep the same sixteen feet in perpetual good order and repair, at its own proper cost and charges, from the date of the rendition of this judgment. The Greensburg and Pittsburgh Turnpike Road Company to keep in like perpetual good order and repair, at its own proper costs and charges, the residue of the said turnpike road, according to the width of said road, as prescribed by its charter.

Where any change in the grade of the said turnpike road is required for the ease or convenience of the Citizens' Passenger Railway Company, it shall grade the same in width from water table to water table, said grade to present a surface flat enough

for the ease and convenience of carriages and wagons using the road.

The use and occupation of the Greensburg and Pittsburgh turnpike road by the Citizens' Passenger Railway Company, shall not be in anywise detrimental to or inconsistent with the free, full and unobstructed use of the whole of the said turnpike for any and all of the purposes for which it is now used by the public.

And it is adjudged that the petitioner and respondent in this proceeding each pay one-half the costs.

BY THE COURT.

In the matter of the Citizens' Passenger Railway Company with the borough of Lawrenceville; No. 12 of March Sessions, 1859.

ORDER.—The court adjudges for the use of the Citizens' Passenger Railway for the purposes of its road, sixteen feet in width on Butler street, in the borough of Lawrenceville. Beginning on Butler street at the mouth of said street where it begins at the Greensburg and Pittsburgh turnpike road; thence along Butler street and the road which is a continuation of the same in said borough to the cemetery gate, a distance of five thousand and two feet, or thereabouts.

The Citizens' Passenger Railway to use and occupy sixteen feet in width of Butler street and its continuation as aforesaid.

And the court doth fix and adjudge the rate of compensation to be made by said company for the use of said street, and its continuation in said borough, and the terms on which it shall be used, and the manner in which the same shall be kept up by the respective parties, as follows: The Citizens' Passenger Railway to use and occupy for the purposes of their road, sixteen feet in width of Butler street and the continuation thereof. The said railway to pave with cobble stone, eighteen feet, or one-half of the width of said street and its continuation to the cemetery gate as aforesaid, so soon as the borough of Lawrenceville shall have paved the residue of said street and its continuation from the mouth of said street at the Greensburg and Pittsburgh turnpike road to the cemetery with cobble stone, in a style to equal the

paving done by the railway company, then the street to be kept in perpetual repair by the Citizens' Passenger Railway Company at its own proper cost and charges.

And so soon as the whole street and its continuation, as aforesaid, shall be paved, then the use and occupation of the said street and its continuation by the Citizens' Passenger Railway Company, shall not be in any wise detrimental to or inconsistent with the free, full and unobstructed use of the whole of the said street or its continuation for any and all of the purposes for which it is now used by the public.

And it is adjudged that the petitioner and respondent in this proceeding each pay one half the costs. BY THE COURT.

NOTE.—Should the borough of Lawrenceville, over which we can exercise no legal coercion in the premises, fail faithfully to perform its promises made in open court in the premises, then this court will entertain a motion to rescind and revoke the order this day made, and make a new one.

(The assurances given in open court by the borough of Lawrenceville, were, among others, that said borough would pave the street, or the same distance as the Passenger Railway may pave, at the same time, and in the same manner.)

In the matter of the petition of the Citizens' Passenger Railway Company with the Lawrenceville and Sharpsburg Plank Road Company. No. 13 of March Sessions, 1859.

The petition represents that, "for the purposes of its road the Citizens' Passenger Railway Company will be compelled to use about sixteen feet of the said plank road."

No further reference than this is made, and no more minute description is given of the "portion" of the plank road the petitioners will be compelled to use. What number of feet is not designated in the petition, nor the distance of any line in length. The sixteen feet mentioned in the petition is descriptive of breadth.

The length of this plank road may be estimated by miles; the argument of the petitioner is so confined to about twelve hundred feet in length by sixteen feet in width.



The plank road is a corporation, an entirety, a unit; and the petition treats it so. Sixteen feet of the plank road without any further description, means sixteen feet of the whole distance from end to end of the plank road. This view is strengthened by the words of the Act of Assembly, which, in describing the route of the Citizens' Passenger Railway Company, continues "thence to the Lawrenceville and Sharpsburg Plank Road, and along said road to the Sharpsburg Bridge." This description embraces the whole distance or length of the plank road as described in its charter.

I will not decide the serious question whether, under this law one corporation can swallow another corporation piecemeal or must swallow it whole; or in other words, whether the powers of this court are exhausted when one order is made and its judicial functions ended. Suffice it to say, that if the court adjudges on a fractional part of the road, its order will not correspond with the petition, and if it should decide upon the whole of it, then our decree will not correspond with the facts.

If an order be now made, and another petition is hereafter presented, and we are called upon to adjudge the rate of compensation for the use of the residue of the plank road, the record will show that it has been adjudged already, although the fact will be otherwise.

I need pursue these difficulties no further. In the case of the Greensburgh and Pittsburgh Turnpike Road they do not arise, as all that will ever be wanted was taken at once. The respondent alleges that no effort was made by the petitioner to agree upon terms for the use of the road. If this be so, the jurisdiction of this court has not attached. It is unnecessary to decide this fact, as this court feels constrained, for the reasons already given, to dismiss the petition without prejudice to either party.

This petition is dismissed at the cost of the petitioners.

Lehigh Bridge Co. v. Lehigh Coal and Navigation Co., 4 Rawle 9; Toll Bridge Co. v. Hartford and New Haven R. R. Co., 17 Conn. 40.

*In the District Court of Allegheny County.*

## KARL v. BLACK'S EXECUTORS.

(Vol. VII., p. 34. 1859.)

One of three executors, all of them being in full life, cannot without the knowledge and consent of the other two, who are the acting executors, confess a judgment which will bind the estate.

THIS was a rule to show cause why the judgment, at No. 203 of July Term, 1857, in favor of Elizabeth Karl, against the executors of Marcus Black, deceased, should not be set aside.

The case was argued by *Morrison*, for the executors, and by *Koethen*, *contra*.

The facts are sufficiently detailed in the following opinion by HAMPTON, P. J.—On the 19th day of May, 1857, an amicable action was entered in this court and, by writing filed, judgment was confessed by Cyrus Black, one of the executors of Marcus Black, deceased, against the estate of the testator, for the sum of \$244 28, with release of all errors, and without stay of execution.

On the 28th of August, 1858, Joseph S. Morrison, one of the executors of Marcus Black, filed his affidavit setting forth that the Rev. John Kerr and himself had been the acting executors of Marcus Black, and that Cyrus Black had occupied a position antagonistic to the estate ever since the death of the testator. That in consequence of the adverse interests and hostile position of the said Cyrus Black, the said John Kerr and deponent had the management of the business of the estate, and that this judgment was obtained without their knowledge or consent by the confession of the said Cyrus Black alone; that they had no knowledge of its existence till execution was issued upon it, and that the deponent believed the estate of the deceased was not liable upon the alleged claim of the plaintiff in this case.

On the filing of this affidavit a rule on the plaintiff was granted to show cause why the judgment should not be set aside on the ground that one of several executors had no power to confess a

judgment so as to affect the estate of his testator without the knowledge and consent of his co-executors.

The facts set forth in the affidavit of Mr. Morrison not having been traversed must be taken as true, and the question to be determined is, whether one of three executors, all of whom being in full life, can, without the knowledge and consent of the other two, who are and have been the acting executors, confess a judgment which will bind the estate.

When there are more than one executors appointed by a testator, they are generally considered in law as one person, unless separate powers are conferred by the will. Each one may, for certain purposes, however, be regarded as acting for all, and in such cases, his acts will bind his co-executors when done for the benefit of the estate, and not in contravention of, or prejudicial to, the joint trust conferred upon all. Thus one executor may receive a debt due to the estate and give a receipt which will bind the others; he may employ counsel to prosecute or defend legal proceedings affecting the estate, and the counsel so employed, within the legitimate range of his professional functions, will be obligatory on all the executors. He may do many other acts tending to promote the objects of the trust confided to them by the testator. But to allow one of several executors or administrators to bind the estate of his decedent by judgment, without the consent of his colleagues, would open a door to intolerable frauds. Judgments sufficient to absorb any ordinary estate, might thus be confessed to favorites as pretended creditors, without the possibility in many cases of inquiring into, or discovering the fraud. Innocent executors, who were ignorant of judgments so confessed by their fellows might be involved in the charge of wasting and mismanaging the estate committed to their care, without the power of extricating themselves from their perilous position. A principle that leads to such disastrous consequences cannot be sound. But fortunately we are not left without authority on this question. It was decided in *Heisler v. Knipe*, 1 Browne 319, that a judgment against one administrator did not bind the other, nor the estate of the deceased. In *Forsythe v. Ganson*, 5 Wend. 558, it was held that in an action against administrators, where there are several, the admis-

sion of indebtedness by one will not entitle the plaintiff to recover. And in *Fritz v. Thomas*, 1 Wharton 66, it was first settled in our own state, that the acknowledgment by one of two administrators was insufficient to take the case out of the Statute of Limitations. The doctrine of that case was re-affirmed in *Reynolds v. Hamilton*, 7 Watts 420, when it was ruled that a promise of an executor to pay the debt of his testator will not take it out of the operation of the Statute of Limitations. If, therefore, his admissions of, and promises to pay the debt of the testator, could not be given in evidence to establish the plaintiff's right to recover, the want of power to confess a judgment for the debt, follows as a logical necessity. And accordingly the principle of those cases has been carried forward by the Supreme Court to its legitimate results in *Hall v. Boyd*, 6 Barr 267, where they have decided that a judgment confessed by one executor without the knowledge of his co-executors does not bind the estate of the testator. This case is directly in point and I am not aware that its authority has been impaired by any subsequent decision.

On principle, therefore, as well as authority, I am clearly of opinion that this judgment cannot be sustained.

The judgment and all subsequent proceedings are set aside.

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*In the Circuit Court of the United States for the Western  
District of Pennsylvania.*

ADAMS v. WHITE.

(Vol. VII., p. 41. 1859.)

1. Matters which appertain solely to the jurisdiction of a court, or to the disabilities of a suitor, should never be blended with questions which enter essentially into the subject-matter of the controversy.
2. In dilatory pleas the greatest precision is required.
3. A plea to the jurisdiction concludes to the cognisance of the court, by praying judgment if the court will take cognisance of the suit, or of the plea (declaration) aforesaid.
4. Plea to the jurisdiction must be signed by the defendant in person, and not by attorney.

5. The affidavit accompanying the plea must be positive, and not "as he believes."
6. The plea must be put in within four days of the term, to which the declaration is filed, counting both days inclusive.
7. Filing plea in bar is a waiver of the plea in abatement.
8. A literal copy of the note, omitting the endorsement, which is averred in the declaration, is a compliance with the 71st rule of the United States District Court.
9. In his affidavit of defence, the defendant must state "fully and particularly," the nature and amount of his set off.
10. To put plaintiff on proof of consideration of negotiable paper, it must be shown that it was obtained, or put in circulation, by fraud or undue means.
11. When the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who have an equitable interest in the claim.
12. He who has the legal right may sue at law in the Federal Courts, without reference to the citizenship of those who may have the equitable interest.

THE facts of this case sufficiently appear in the opinion of the court. It came up on a plea to the jurisdiction of the Circuit Court of the United States, and on a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence.

*C. B. M. Smith*, for plaintiff.

*John M. Kirkpatrick*, for defendant.

As the case involved important questions relating to the jurisdiction and practice of the courts of the United States, the court directed a reargument, and it was reargued on the 19th inst.

The opinion of the court was delivered August 20th, 1859, by

M'CANDLESS, J.—Plaintiff sues upon a note dated 26th October, 1858, at four months, for \$2,055 97, drawn by defendant, payable "to the order of myself," and endorsed by him. An affidavit of claim and copy of note, omitting the endorsement, were filed with the precipe; and before the return day of the writ a *narr.* was filed, reciting the note, and averring the endorsement to plaintiff.

Defendant's counsel interposes a plea to the jurisdiction, and

an affidavit of defence. We must dispose of this plea before considering the argument upon the affidavit. Before the court can proceed to entertain any question on the merits, it must know that it possesses proper jurisdiction over the parties. It is plain that the question as to the citizenship of the parties must be preliminary in its nature, and the exception must be taken by way of a plea: 4 Mason 437; 7 Howard 19.

1. Then as to the point of jurisdiction. The plea filed in this case is bad both in substance and form. It does not deny that plaintiff is a citizen of the State of Virginia, but alleges that the note on which this suit is brought, is the property of John M'Vay, a citizen of Pennsylvania, who is not entitled to sue in the courts of the United States. That is a question of title, and is matter in bar, and not in abatement. It has been received as a canon of pleading, that matters which appertain solely to the jurisdiction of a court, or to the disabilities of a suitor, should never be blended with questions which enter essentially into the subject-matter of the controversy; and that all defences involving inquiries into that subject-matter imply, nay admit, the competency of the parties to institute such inquiries, and the authority of the court to adjudicate upon them. Hence it is, that pleas to the jurisdiction, or in abatement, are deemed inconsistent with those which appertain to the merits of a cause; they are tried upon different views, as to the relations of the parties, and result in different conclusions: 14 Howard 505; Gould 221.

As to the form of the plea. In dilatory pleas the greatest precision is required: 3 Term Rep. 186. This plea has no conclusion—it prays no judgment. The language of the pleader's last sentence is “therefore he pleads that this suit may abate, at the proper costs and charges of Samuel Adams, plaintiff above-named,” a person by the way, the defendant alleges is a myth, and has no substantive existence.

A plea to the jurisdiction concludes to the cognisance of the court by praying judgment if the court will take cognisance of the suit, or in more technical language, of the plea (declaration) aforesaid: Gould 238. The present plea is by attorney. A plea to the jurisdiction must be signed by the defendant in person. For, if signed by an attorney, who is an officer of the court, he

is supposed to have signed it by leave of the court, and the asking of leave is a tacit admission of the jurisdiction: Bacon's Abr. Abat. A., Pleas E. 2.

Again, the affidavit, which, a necessary adjunct to all pleas in abatement, must, in a plea to the jurisdiction, be positive, and not "as he believes." This is fatal to this plea.

The rules of courts of law with regard to dilatory pleas are very stringent, and require them to be put in within four days after the term to which the declaration is filed, counting both days inclusive. They require also, that the affidavit of the truth of the plea be positive and not according to the belief of the defendant. In the practice of these courts also, a dilatory plea, not filed in time, or subsequently authenticated, may be treated as a nullity, and the party making it defaulted for want of a plea: Grier, J., 1 Phila. 576.

Aside from all this, the defendant has filed a plea in bar. This is a waiver of his plea in abatement: 2 Casey 462. It is a rule of pleading without an exception, that objections to the jurisdiction of the court, or the competency of the parties, are matters pleadable in abatement only; and that if, after such matters relied on, a defence be interposed in bar, and going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial, and are waived: 14 Howard 510.

2. As to the affidavit of defence. It is alleged in the affidavit, and was contended with ability on the argument, that the copy of the notes filed was not a literal transcript, required by the rules of court. But the defendant has not informed us in what the difference consists. If it be the omission of the endorsement, that is supplied by the averment in the declaration.

The defendant claims that he has a set off, but it is not against the demand of the plaintiff, but John M'Vay, and we are not advised of its nature or amount. In the affidavit he states that the amount of set off "he does not exactly know," and hence is unable exactly to designate the same. If John M'Vay were the plaintiff here, this would be insufficient, and is less sufficient when suit is brought by an innocent holder. Under the rule he must state his defence "fully and particularly." The burden of the

affidavit is that John M'Vay is the real plaintiff, and that the name of Adams is used to sue in this court.

The plaintiff is the holder of a note which is negotiable; and to put him on proof of consideration, it must be shown that it was obtained or put into circulation by fraud, or undue means. Some fact must be alleged from which we can reasonably infer that the note came into the hands of the holder by fraud, or without consideration: 6 W. & S. 222. There is nothing here but a vague allegation.

When defendant drew this note payable to the order of himself, and endorsed it, he converted it into negotiable paper, payable to bearer, untrammelled in its circulation, subject at maturity to suit in the hands of any holder, and exempt from impertinent inquiry, from any quarter, as to the consideration.

After he endorsed it, it passed by delivery; and the plaintiff had the same right to sue upon it in his own name, as if it had been made payable to bearer. He alleges that he is a citizen of Virginia, and consequently the Circuit Court of the United States has jurisdiction: 3 Howard 574.

When the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. They are not necessary parties on the record. A person having the legal right may sue at law in the Federal Courts, without reference to the citizenship of those who may have the equitable interest: 14 Peters 298. The opinion of the court is with the plaintiff on both points submitted.

The plea to the jurisdiction is overruled. The rule to show cause is made absolute, and judgment for the plaintiff; sum to be ascertained by the clerk.

As to the pleadings, see cases cited in note to *Yeatman v. Henderson*, 1 Pittsb. 20; upon the other branch of the case, see *Snyder v. Riley*, 6 Barr 164; *Gray's Administrators v. The Bank of Kentucky*, 5 Casey 365; *Jarden v. Davis*, 5 Whart. 338; *Phelan v. Moss*, 17 P. F. Smith 59.



*In the Common Pleas of New York.*PETITION OF JOHN SNOOK.<sup>1</sup>

(Vol. VII., p. 49. 1859.)

1. Though the custom is wide-spread and universal for all males to bear the name of their parents, there is nothing in the law prohibiting a man from taking another name if he chooses. There is no penalty or punishment for so doing, nor any consequences growing out of it except as far as it may lead to, or cause a confounding of his identity.
2. Wherever a man has done an act in a particular name, or where he makes a grant, it may always be shown in support of the validity of the act, that he was known by that name, at and about the same time when the act was done, though he may have been baptized or previously known by a different name. All that the law looks to is the identity of the individual, and when that is clearly established, the act will be binding upon him and upon others.

MR. JOHN SNOOK made an application to the Court of Common Pleas, for leave to change his name to John Pike, under which name he had been doing business for some years past, and by which he was well known. The following opinion and decision was rendered by

DAILY, J.—This is an application for an order, authorizing the petitioner to change his name to John Pike.

He sets forth in his petition that Snook is a name of German origin, corresponding with the English word Pike. That some years ago he intended to apply to the legislature for liberty to change his name, and consulted a lawyer, who advised him that he had the right to change his name himself, and that such application was not necessary. That he accordingly changed his name to John Pike, and became a member of a firm in the city of Syracuse, under the name of "John Pike & Co.," and under that name became, and is, known to a large number of his business acquaintances and enjoys under it a business good-will. That he contemplates entering into a co-partnership with a

<sup>1</sup> This case though decided by a foreign state court has been inserted here (in disagreement with the editor's plan), for the reason that the discussion of the subject is considered to be very exhaustive, and with the authorities cited in it might be of some value.

gentleman in this city, who objects to the name of Snook appearing in the business title or name of the firm, and that the petitioner believes it to be for his pecuniary interest that his name should be known as John Pike.

Under the Act of 1847, a judge of this court may authorize any person of full age residing in this state, to assume another name, if the judge is satisfied that the applicant will derive any pecuniary benefit from assuming another name. By this it is understood, that the judge is to be judicially satisfied, upon proper proof (*Smith v. Luce*, 13 Wend. 237), that such will be the effect if the name is changed. To put a case in point; if an estate is left to a man by will upon condition that he takes the name of the testator, then it is apparent that he will derive a pecuniary benefit by being allowed to assume it. In this case the petitioner merely shows that he believes that it will be for his pecuniary interest that his name should be changed to John Pike; but that, in my judgment, is not sufficient to give me authority under this act, to order his name to be changed.

The mere possibility or probability that such may be the effect is not enough. The evidence before the judge must be such that he can say judicially that the applicant will derive a pecuniary benefit by assuming another name, or a case is not presented that will entitle the officer to exercise the special jurisdiction conferred by this act.

The question has been asked upon this application whether he has not the right to translate his name into the English language, and call himself by the word in English which is equivalent to or of the same meaning as Snook. It does not fall within the sphere of my judicial duty to pass upon that question, but as this application has been made in good faith and is very earnestly pressed, I have no objection to state my views. The word "Snook" is not, as the applicant supposes, of German origin, nor is "Pike" expressed in German by such a word. The word is Dutch or Flemish, from "Snock," signifying pike, a species of fish: *Wernick's Dictionary*. The meaning of the word constituting the name of a person is of no importance, for, considered as a name, it derives its whole significance from the fact that it is the mark or *indicia* by which he is known.

Many names have no specific meaning apart from indicating the persons who bear them; and as *designatio personæ*, it makes no difference should the word or name performing the office, as is frequently the case, be also a word for expressing something else. As the proper or lawful names of persons is a subject to which legal writers have paid but little attention, it will be necessary to examine the state of the law respecting it. As I have said, a man's name is the mark or *indicia* by which he is distinguished from other men. By a practice now almost universal among civilized nations, it is composed of his Christian or given name and his surname. The one is the name given to him after birth or baptism; the other is the name given to him after birth—is the patronymic derived from the common name of his parents. In the case of illegitimates, they take the name or designation they have gained by reputation: *Ray v. Smith*, 6 C. & P. 154; *Ray v. Clark*, R. & R. C. C. 358. The Christian, or first name, is in law denominated the proper name, and a party can have but one, for middle or added names are not regarded: *State v. Martin*, 10 Miss. 391; *Edmonston v. The State*, 17 Ala. 179; *McKay v. Sheak*, 8 Texas 376; *Ray v. Newman*, 1 Ld. Raym. 562-305; *Franklin v. Tallmadge*, 5 Johns. 64. Formerly the Christian name was the more important of the two. "Special heed," says Coke, "is to be taken of the name of baptism, as a man cannot have two, though he may have divers surnames:" Co Litt. 3 a. m.

Indeed, anciently in England there was but one name, for surnames did not come into use until the middle of the fourteenth century, and even down to the time of Elizabeth they were not considered of controlling importance. Thus, Chief Justice Popham, in *Briton v. Wrightman*, Poph. 56, speaking of grants, declares that "the law is not precise in the case of surnames; but for the Christian name," he says, "this ought always to be perfect." And throughout the early reports the Christian name is uniformly referred to, as the most certain mark of the identity of the individual in all deeds or instruments. Greater importance being attached to the Christian name arose from the fact that it was the designation conferred by the religious rite of baptism, while the surname was frequently a chance appellation assumed by the individual himself, or given to him by others, for some

marked characteristic, such as his mental, moral, or bodily qualities; some peculiarity or defect, or for some act he had done which attached to his descendants, while sometimes it did not. Camden mentions an instance of a knight in Cheshire, each of whose sons took different surnames, while their sons, in turn, also took different names from their fathers. They altered their names, he says, in respect to habitation, to Egerton, Cotgrove, and Overton; in respect to color, to Gough, which is red; in respect to learning, to Ken-clarke (a knowing clerk or learned man); in respect to quality, to Good-man; in respect to stature, to Richard Little; and in respect to the Christian name of the father of one of them, to Richardson, though all were descended from William Belevard; and the gentlemen of Cheshire, he adds, bearing three different family names, he would not easily believe that they were all the descendants of one man, were it not for an ancient roll which Camden saw (Camden's Remains, Ed. of 1637, p. 141), and Lord Coke refers to the Year Books to show that a man may have divers names, that is surnames, at divers times: Co. Litt. 3 a.

The insufficiency of the Christian name to distinguish the particular individual, where there were many bearing the same name, led necessarily to the giving of surnames, and a man was distinguished in addition to his Christian name, in the great majority of cases, by the name of his estate, or the place where he was born, or where he dwelt, or from whence he had come, as in the name Washington, originally Wessyngton, which, as its component parts indicate, means a person dwelling on the meadow land where a creek runs in from the sea; or else from his calling, as John the smith, or William the tailor, in time abridged to John Smith and William Taylor; and as the son usually followed the pursuit of the father, the occupation became the family surname, or the son was distinguished from the father by calling him John's son, or William's son, which among the Welch was abridged to s, as Edwards, Johns, or Jones, Peters, which as familiar appellations passed into surnames. The Normans added Fitz to the father's Christian name to distinguish the son, as Fitzherbert or Fitzgerald; and among the Celtic inhabitants of Ireland and Scotland, where each separate clan or tribe bore a surname to

denote from what stock each family was descended, Mac was added to distinguish the son, and O to distinguish the grandson; and generally where names were taken from a place, the relation of the individual to that place was indicated by a word put before the name, like the Dutch Van or French De, or a termination added at the end, which additions were in time merged into and formed but one word, until from these various prefixes and suffixes numerous names were formed and became permanent. So, as suggested, something in the appearance, character, or history of the individual, gave rise to his surname, such as his color—as black John, brown John, white John, afterwards transposed into John Brown, &c.; or it arose from his height, bulk, or strength, as Little, Long, Hardy, or Strong; or his mental or moral attributes, as Good, Wiley, Gay, Moody, or Wise; or his qualities were practically personified by applying to him the name of some animal, plant, or bird, as Fox or Wolf, Rose or Thorn, Martin or Swan; and it was in this way that the bulk of our surnames that are not of foreign extraction, augmented and became permanent. They grew into general use, without any law commanding their adoption or prescribing any course or mode respecting them, for I know of but one instance of a positive statute commanding the taking of names or regulating the manner of selecting them, and that was limited to a particular locality.

In the fourth year of the reign of Edward IV., an act was passed compelling every Irishman that dwelt within the English pale, to take an English surname, and enacting that it should be the name of some town, or of some color, as black or brown, or of some art or occupation, or of some office, which led to an extensive change of names in that part of Ireland, as a non-compliance was attended with a forfeiture of goods. But though for several centuries the practice of giving or assuming surnames was general, it extended little further than the particular individual of which it was the designation or mark. His descendants adopted it or not, at pleasure, or he assumed a new name himself, or others conferred upon him some characteristic appellation which adhered to him and his descendants. This fluctuation and change, however, was materially arrested by a statute passed (1 Henry V. c. 8), called the Statute of Additions, which required

not only the name of the individual to be inserted in every writ or indictment, but in addition, his calling, his estate, degree, and the town, hamlet, or place to which he belonged; and in the reign of Henry VIII., Cromwell, the secretary of the king, established a regulation by which a record was required to be kept in every parish, of births, marriages, and deaths; a regulation which, in connection with the previous act, operated to check the caprice of individuals in the matter of their names, and to fix them as durable appellations; for every man's name became a matter of record at his birth, his marriage, and at his death, and this recording of such events in every family led to the use of one name to designate the members of one family, which the record served to perpetuate; transmitting it from father to son, until the practice became general for all descendants to bear and become known by the name of a common ancestor. But this was the work of several centuries, and even at the present day, in remote and sparsely settled districts of England and Wales, the practice is not entirely extinct of assuming and changing surnames. All this, it will be seen, was brought about without any positive provision of law, other than those that have been referred to. By a usage sufficiently general to be called universal, the son now bears the name of the father, and in turn transmits it to his own male descendants. Surnames, from their infinite variety, have now become a more certain mark of identity than the first name; for the whole number of Christian or first names now commonly in use does not exceed 600, while the directory of this city exhibits no less than 20,000 varieties of surnames. It is the combination of the Christian and surname that now marks the individual's identity, and he is distinguished still more accurately by the use, now very general, of middle names or initial letters.

But, although the custom is wide-spread and universal for all males to bear the name of their parents, there is nothing in the law prohibiting a man from taking another name if he chooses. There is no penalty or punishment for so doing, nor any consequence growing out of it, except as far as it may lead to or cause a confounding of his identity. In some countries it is otherwise.

In France a law was passed in the second year of the first rev-

olution—L. 6, Fructidor An. 11; and another, 19 Nivoise An. VI., which is still in force: Codes Francais par Bourgigon et Royer; Collard sec. 34 and notes; Dictionnaire de Legislation Universal per Chabal; Chameane, vol. 2, p. 260—forbidding any citizen to bear any first name (prenom) or surname than that which is expressed in the registry of his birth, or to add any surname to his proper name, but no enactment of the kind has ever been passed in England, or in this state, but on the contrary there have been many instances in which individuals have changed their names, and held offices of public trust and become distinguished by the name they adopted. The poet Mallet may be cited as an illustration. His father was of the clan of the Macgregors, and when that clan was suppressed and its name abolished by law in consequence of the violent acts of Rob Roy, he took the name of Malloch, by which name the son was known until he came to London, in his 26th year, when, disliking his Scotch patronymic, he adopted the French name of Mallet, and by this name held an office under government, became distinguished in literature, and transmitted the name to his descendants. That such instances rarely occur may be readily accounted for in the fact of the absence usually of any object to induce a man to change his name, in the circumstances that there is generally a just and honorable pride in bearing the name of one's ancestors, and in the further fact that it is scarcely in the power of a man to change his name unless he goes to a place where he is unknown, for as long as he continues to abide where he is known, people will continue to call him by the name to which they are accustomed.

It is this difficulty, I apprehend, that has led to the practice of applying for the king's license, or the passage of a statute in cases where the taking of a new name has become necessary in consequence of the devise of an estate upon that condition, as all persons will conform to what is decreed or enjoined by the sovereign authority of the state. Lord Mansfield seems to have thought in *Sullivan v. Ashby*, 4 Burr. 1940, that the king's license or an Act of Parliament was essential to entitle a man to assume another name; but in latter cases, the right of an individual to take another name without the king's license or an Act of Parlia-

ment has been distinctly recognised, and the validity of acts done in the adopted name has been sustained, even when they imposed a charge upon the public. In *The King v. The Inhabitants of Billingham*, 8 M. & Selw. 255, the question was whether a pauper, whose baptismal and surname were Abraham Langley, and who, by that name, had a legal settlement in Billingham, could, with his wife and family, be charged upon that parish. He was married in another parish by the name of George Smith, and had been known in that parish for three years before his marriage by that name. The wife and children had no settlement in Billingham, unless they had acquired one by the marriage, and the point involved was the validity of the pauper's marriage by the name of George Smith; the Marriage Act of 26 Geo. II., chap. 33, rendering it essential to the validity of a marriage that there should be a publication beforehand, of the "true Christian and surnames" of the parties. It was insisted that this had not been done, and the marriage was thus void, and that the wife and children were not chargeable upon the parish of Billingham; but the court held that the publication of the banns by the name of Geo. Smith, that being the name which the pauper had gained by reputation, and by which he was known at the time in the parish where he was married, was a publication of the true name within the meaning of the act. In a note at the end of the case, several decisions of Lord Stowell in the Consistory Court are collected. In one of them, *Frankland v. Nicholson*, Ann Nicholson was married, and the banns published by the name of Ann Ross. Sir William Scott, in reply to the argument that the proper Christian and surname of a party could not be altered, except by the king's license or an act of the legislature, said that there might be cases where names acquired by general use and habit would be taken as the true Christian and surname of a party, but as there was not sufficient evidence in the case before him to show that the woman had ever been known by the name of Ross, he annulled the marriage.

In another case before him, *Mayhew v. Mayhew*, which was a proceeding for a divorce, upon the ground of adultery, the woman set up that she had never been legally married, having been described in the publication of the banns as Sarah Kelso, when



her real name was Sarah White. It was shown in reply that she had gone by several different names, but was generally known by the name of Kelso before the marriage; and upon this evidence he held the marriage valid. *Doe v. Yates*, 5 B. & Ald. 544, is a case still more distinctly in point. An estate was devised upon the condition that the devisee should take the surname of the testator. The will provided that within three years after the devisee arrived at the age of twenty-one, he should procure his name to be altered to the testator's name of Luscombe, by Act of Parliament, or in some other effectual way. The devisee, before he was of age, and before he entered upon or was let into the possession of the estate, took the name of Luscombe, which name he continued thereafter to bear. At twenty-one he took possession of the estate, but suffered the three years to go by without applying for the king's license or an Act of Parliament, to entitle him to use the name of Luscombe, and he continued to hold and enjoy the estate for eight years thereafter, when he conveyed it to the defendants. It was insisted that he had forfeited the estate by having failed to comply with the testator's directions within the three years after he reached twenty-one, in not obtaining or applying for the king's license or an Act of Parliament, authorizing him to take the name of Luscombe. But the court gave judgment for the defendants, holding that the devisee had sufficiently taken the testator's name, and that it was not necessary for him to apply for an Act of Parliament or for the king's license. "A name," said Chief Justice Abbott, in delivering the judgment of the court, "assumed by the voluntary act of a young man at his outset into life, adopted by all who knew him, and by which he is constantly called, becomes, for all purposes that occur to my mind, as much and effectually his name as if he had obtained an Act of Parliament to confer it upon him;" and there are numerous cases, both in this country and in England, holding that where a man enters into a contract, or does any act in a particular name, he may be sued by the name that he used, whatever his true name may be; and generally, that wherever a man has done an act in a particular name, or where he makes a grant, it may always be shown in support of the validity of the act that he was known by that name at and

about the same time when the act was done, though he may have been baptized or previously known by a different name. All that the law looks to is the identity of the individual, and when that is clearly established, the act will be binding upon him and upon others: *Waterbury v. Mather*, 16 Wend. 611; *Griswold v. Sedgwick*, 6 Cowen 456; *Jones' Estate*, 27 Penn. St. 336; *Prettyman v. Wales*, 4 Harring. 299; *Toole v. Peterson*, 9 Ired. 180; *Selman v. Shackelford*, 17 Geo. 615; *Williams v. Bryant*, 5 M. & W. 447; *Finch v. Cocken*, 5 Tyrw. 774; *Attorney-General v. Hawkes*, 1 C. & J. 120; *The Queen v. Avery*, 18 Ad. & E., N. S. 576; *Comyn's Digest*, Fait E. 3.

I have gone into the examination of this question so minutely, because it has never, so far as I am aware of, been previously investigated; and into the origin of the usage that now prevails in respect to names, because the works commonly referred to in matters of general knowledge are exceedingly barren of information upon the subject of personal nomenclature. The result of the examination will show, I think, there is nothing in the law to prevent the petitioner from continuing to call himself John Pike. If, as stated in his petition, he adopted it years ago, engaged in business by that name, and is known among his business acquaintances and customers by that designation, there is no reason why he shall not continue to use it. Any contract or obligation he may enter into, or which others may enter into with him, by that name, or any grant or devise he may hereafter make by it, would be valid and binding; for, as an acquired and known designation, it has become as effectually his name as the one which he previously bore. I have no hesitation, therefore, in saying that I think he may lawfully use it hereafter in all transactions as his name or designation.

Motion for an order changing the name of petitioner denied.

*In the Supreme Court of Pennsylvania.*

## DIRECTORS OF THE POOR v. DAVIS.

(Vol. VII., p. 73. 1859.)

1. The primary duty imposed by the general poor laws, upon the overseers of the poor, in emergencies arising from disease or sudden infirmity, is to furnish relief, next to obtain an order of maintenance, and then afterwards, if practicable, an order of removal. In such cases relief may precede any order for that purpose, and the proper district would be liable to pay therefor without such order.
2. The provisions of the special poor law, enacted for Allegheny County, viz.: Act of 23d April, 1852, and supplement of 18th April, 1855, are in plain affirmance of the humane purpose of all previous laws on the subject, and were not intended to effect any change in the principles of the original design, but merely in the executive machinery, or details, by transferring the duties and liabilities of the overseers under the prior law, to the directors under the latter one.

**ERROR to the Common Pleas of Allegheny county.**

This action, originally brought before Alderman Johns, was taken by appeal to the Common Pleas.

The facts were thus stated in the charge below.

“E. A. Davis brings suit against the Directors of the Poor of Allegheny county, for nursing and attention afforded to John Hartman, of Elizabeth, in said county. Hartman was without money or property, and was taken or came to the plaintiff's on Thursday, Oct. 14, 1856, took sick on the 20th of the same month, and died on the 31st. His disease was a sudden and violent attack of dysentery, and his physician testifies that perfect repose was indispensable in his high state of inward inflammation, and that to remove him at any time after his attack would have jeopardized his life.”

*Thos. Howard*, for plaintiff, cited the following Act of Assembly, sec. 2, Act of April 18th, 1855, “That in case of inability on the part of the constable to remove any such person or persons, on account of extreme illness, as certified by a physician, the said board of directors of the poor shall be liable for the expenses of said patient or patients, to be recovered as debts of like amount are now by law recoverable.

The attending physician certified in accordance with this act, and two justices also certified that they had examined the matter and the bill was reasonable.

The court below, McClure, J., charged that the plaintiff was entitled to recover, and the jury so found.

*Woods*, for Directors, assigned for error, that Hartman had never been properly certified to directors by two justices of the peace, according to the Act of Assembly, and that the constable had no such order as required by law; and that it was the duty of the plaintiff to have notified the directors, so that they could have taken charge of him. That under the facts the plaintiff was not entitled to recover.

The following was filed, by order of the court, as their opinion, at Philadelphia, Jan. 3d, 1859, by

CHURCH, J.—The provisions of the Act of Assembly of the 23d of April, 1852, for erecting a house for the employment and support of the poor in Allegheny county, and of its supplement of the 18th of April, 1855, are in plain affirmance of the humane purpose of all previous laws on the subject, and evidently designed to furnish a more simple, effective and systematic application of the public charities, in relieving the poor of the county. The construction to be given these provisions, therefore, should be such as will best advance the general objects, without any unnecessary embarrassments from over-nice technical distinctions.

The primary duty imposed by the general laws, upon the overseers of the poor, in emergencies arising from disease or sudden infirmity, was to furnish relief, next, to obtain an order of maintenance, and then afterwards, if practicable, an order of removal. Hence it has been repeatedly adjudged by this court that in such cases relief may precede any order for that purpose, and that the proper district would be liable to pay therefor without such order. And this special law for Allegheny county, is not more peremptory in requiring orders of removal to the house of employment, than is the general law in requiring orders of maintenance and removal. The legislature do not seem to have effected or even contemplated any change in the principles of the original design,

but merely in the executive machinery, or details, by transferring the duties and liabilities of the overseers under the prior law, to the directors under the latter one.

According to the authorities cited and the principles enunciated in the case of *The Directors of the Poor of Westmoreland County v. Murry*, 8 Casey 178, decided at the present term, and to which reference is made, perhaps this action could have been maintained without resorting to the provisions of the second section of the Supplementary Act of 1855. But under this section there is left no room to doubt the liabilities of the directors, the defendants below. The language used is very clear and explicit: —“In case of inability on the part of the constable to remove any such person or persons, on account of extreme illness, as certified by a physician, the said board of directors of the poor shall be liable for the expenses of said patient or patients, to be recovered as debts of like amount are now by law recoverable.”

The case of *The Directors of the Poor v. Wallace*, 8 W. & S. 94 (and there are others to the same effect), very clearly shows that a certificate in the nature of an order for relief, may be available, although not obtained until subsequent to the death of the pauper, as appears to have been the case here. The parties have not furnished us with the evidence in the cause, and therefore we are unable to say, whether the orders and certificates from the physician and justices were sufficient either in form or substance. It is enough that we are informed by the charge of the learned judge of the Common Pleas, that they had been procured. If they had been otherwise, the nineteenth section of this special or local Act of Assembly, left sufficient of the general law in force, within the county, to enable the directors to obtain a reversal on an appeal to the Quarter Sessions. Having omitted the direct legitimate remedy, they could not claim it in the Common Pleas, nor have the proceedings now reviewed here collaterally. For these reasons, as well as those given by the learned judge on the trial below, we think this judgment ought not to be disturbed.

Judgment affirmed.

*Directors v. Worthington*, 2 Wright 160; *Nippenose v. Jersey Shore*, 12 Id. 402.

*In the Supreme Court of Pennsylvania.*

## EMERSON ET AL. v. THE BOROUGH OF BLAIRSVILLE.

(Vol. VII., 75. 1859.)

1. A limitation on the taxing powers of municipal corporations is not equivalent to a prohibition to contract debts.
2. If town councils should be so improvident as to let debts be contracted for town purposes beyond the reach of the means which their taxing power can provide, the courts have no authority to control them, when the law of their existence does not restrain them.

THIS was a bill in equity, filed in the Supreme Court by Edward P. Emerson and fourteen others, citizens of the Borough of Blairsville, against the councils of said borough, asking for an injunction to restrain defendants from proceeding with the erection of a market house, town hall, &c., and also to prevent them from collecting certain taxes assessed to defray the expense of said buildings.

The estimated cost of the buildings contracted for was about \$4000. By the borough charter the annual tax assessable for borough purposes was not to exceed one per cent. on property assessable for county rates and levies, "unless some object of general utility should require the same, in which case, the consent thereto of a majority of the taxable inhabitants of the said borough should be previously obtained in writing." The consent of the taxables was not so obtained in this case, and the amount of tax obtainable by the assessment of one per cent. would not be over \$1500 per annum.

Complainants contended, *inter alia*, that the limitation of one per cent. on the taxing power of councils was designed to prevent the creation of a debt payable in the future, against the will of the corporators; at least without the written approbation of a majority of the taxables, and that therefore the contract was void.

*Wm. A. Todd and H. D. Foster*, for complainants.

*Edgar Cowan*, for respondents.

The opinion of the court was given at Harrisburg, May 11, 1859.

PER CURIAM.—We have not understood a limitation on the taxing power of municipal corporations to be equivalent to a prohibition to contract debts. Almost all towns are so limited in their taxing power; yet they have been considered competent to contract debts for town purposes. They may be so improvident that their debts may get beyond the reach of the means which their taxing powers can provide, but creditors must take care of this. Certainly this court has no authority to control the town councils in such matters, when the law of their existence does not restrain them. We discover no such facts in the case as can sustain this bill.

Bill dismissed at the cost of the plaintiffs.

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*In the Common Pleas of Erie County. In Equity.*

CURRY v. THE TRUSTEES OF THE FIRST PRESBYTERIAN CONGREGATION IN THE CITY OF ERIE.

(Vol. VII., p. 105. 1859.)

1. Pewholders in a church are liable, under the established general rules and regulations of the association, for increased *pro rata* assessments laid by the trustees of the association, on the value of the pews, to raise the necessary means of defraying the proper and current expenses of the association, notwithstanding in the deeds originally given to the pewholders for their pews a specified lower rate per cent. was reserved.
2. The trustees of a religious association may adopt by-laws or resolutions to equalize the amount necessary for its support, and assess the proportionable amount on each pewholder, though there is no provision in the constitution or articles of association authorizing them so to do.
3. Property in a pew is a mere easement, being confined to the right to sit therein during public worship.

THE facts of the case are set forth in the opinion of the court.

*Walker, Wetmore & Spencer* for complainant.

*Marshall & Douglass*, for respondents, cited 1 Pick. 102; 2 U. S. Eq. Dig. 377-8; 3 Edwards' Ch. 155; 3 Kent's Com. 489; 5 Cowen 396; 5 S. & R. 510; 2 Kyd 110; 12 Harris 250; 7 Casey 9; 19 Johns. 478; Brightly E. J. 171-2.

GALBRAITH, P. J.—The complainant alleges in his bill the right to a pew in the First Presbyterian Church in the city of Erie, by virtue of a deed to Josiah Kellogg, dated 1st September, 1825, for the consideration of \$110, payable in instalments, and subject to an annual rent of six dollars and sixty cents; a transfer of this deed to him by Josiah Kellogg, May 3, 1843; that the original purchase-money (\$110), with the annual rental of six per cent. upon the purchase-money, was regularly and punctually paid; that afterwards, in August, 1857, the respondents, claiming additional taxes or assessments to the amount of \$78 66, gave notice that they would sell the said pew for the payment of said taxes or assessments, on the 25th of that month. The bill denies the right of respondents, and prays that they may be restrained from proceeding further in the sale. The respondents reply, in substance, that all this is true; but, by general resolutions and by-laws, the trustees and congregation, finding it necessary, for the payment of debts, the rebuilding and improvement, changes and repairs on the church edifice, and payment of the pastor, to raise additional amounts to that which would accrue from the assessment of six per cent., according to the original plan in 1825, had assessed a tax of nine per cent. in 1851, and another of twelve per cent. in 1856; that the church had been partly rebuilt, changed and improved, and new pews built instead of the old ones of 1825; that the complainant had accepted pew No. 49, at the price of \$175, according to the changed and improved plan, in the place of the original, numbered 42, at \$110; that the additional tax or assessment became necessary, was regularly assessed, notice given, &c., and formed the amount for which the trustees were proceeding to sell the pew as complained of. The respondents have shown substantially this state of facts, and claim that they had the right to assess this tax and sell the pew No. 49 for the purposes men-



tioned, and on this ground resist the application of the complainant; and thus the question is presented.

The condition of church property, or pews in a church or religious society, in this country, is various, and we have all varieties of ways and means by which they are supported and maintained. Something has been said in this case about tithes; that if the claim of the respondents here be entertained, the principle is no better than that of the tithe system. Thank God and such men as Penn, the founder of our own state, no man is bound to support any church in this country, but by his own consent, according to the freedom of his own will and conscience. Still, while he is a member, he must comply with the rules and by-laws of the particular organization of which he has chosen to be a member, and ought not to complain when he is not required to contribute more than his fair and equal proportion of the means necessary to sustain it. Some churches are erected and sustained entirely by the voluntary contributions of members and others, and the seats are all free, no one having a right to any particular seat or pew. Some, as we understand this church to be, are organized on the principle of support by pewholders; and I have no doubt, on general principles, that the trustees and congregation could adopt a by-law or resolution to equalize the amount necessary for its support, and assess the proportionable amount upon each pewholder, even if there were no express provision in their constitution or articles of association authorizing them to do so. Church property, or a pew in a church thus organized, is under a condition entirely different from any other property. Indeed, it can hardly be said to be property at all, in the strict sense of the term, it being a mere easement enjoyed for a particular purpose. The owner can make no other use of it than that for which it is appropriated by the resolutions, by-laws and regulations of the association under which it is held. He could not set up a grocery, a grog-shop, or apply it even to any other useful purpose, or shut it up and prevent the use of it by anybody. He has the right to the exclusive use and enjoyment of it during the services of the church for whose worship and services it was appropriated, and for that purpose to shut everybody else out, subject to the lawful rules of the association

or church by which it was appropriated. Every other pewholder enjoying the same privilege, subject to the same conditions, confusion and disorder in occupying different seats of different persons, as they reach the place of audience, is thus prevented. That such was the condition of pew No. 42, under the original plan, I have no doubt, had a larger amount than six per cent. become necessary for the legitimate purposes of the church organization. There is nothing in the case, had it stood thus, excepting the stipulation in the deed to Josiah Kellogg, of September 1, 1825, which could raise the least doubt; and I think that stipulation must yield to the general principle or law of the organization itself.

But the case does not rest here. The church, through its authorized officers and agents, rebuilt and remodelled the former church edifice; in fact, demolished it, so far as the original plan was concerned, and did what amounted to the construction of a new plan. Pew No. 42, at the price of \$110, was taken away—demolished. If this reconstruction was unnecessary, but a mere matter of taste or fancy, and the then owner of that pew was dissatisfied with the change, it is possible, nay, I think probable, he might have refused to accept the pew erected in the place of it, and called upon the corporation to refund to him the price paid for the original pew, or whatever damages he suffered in consequence of the unnecessary destruction of his pew, and abandoned the association altogether. But he did not choose to do so. He accepted the new pew allotted to him, No. 49, at the price of \$175. It cannot, with any kind of accuracy of expression, either natural or legal, be said to be the same pew. It was probably as near the original location as it could be by the new plan, but it faced in a different direction, was on a different plan, and there is no evidence that it was composed of the same materials. It was essentially a different article, at a different price and bearing a different number, which was the same thing as a name for that species of article—the term by which it was distinguished from others of the same kind. Its identity was lost, and the acceptance amounted to the purchase of a new and different pew, paying for it with the old one and abandoning it, and with that abandonment waiving all the conditions and stipu-

lations of the deed of the 1st of September, 1825, if they were available for him before and obligatory upon the church.

For these reasons we dismiss the complainant's bill.

Church v. Wells' Executors, 12 Harris 249; Methodist Society v. Brayton, 9 Allen 248; Universalist Society v. Cooke, 7 Rhode Island 69; Congregation v. Quackenbush, 10 Johns. 217; and as to the rights of pewholders generally, see cases collected in Abbott's Digest of Corporations, p. 711.

*In the Common Pleas of Erie County. In Equity.*

SLOAN v. MOORE AND LINTS.

(Vol. VII., p. 114. 1859.)

1. One partner of a manufacturing firm has not the power without the consent of his co-partner to sell out the whole assets of the firm, including the tools of their trade, and thus terminate the partnership, and a court of equity will interfere by injunction to prevent the consummation of such an attempted sale.
2. Upon the dissolution of a partnership, if the firm do not harmonize in their views as to the disposition of the assets, the appointment of a receiver is of course.

THE facts of the case fully appear in the opinion of the court.

The case was argued by *Grant* for Sloan, *Marshall* for Moore, *Walker* and *Lane* for Lints.

The opinion of the court was delivered by

DERICKSON, J.—At the last sitting of the court, the complainant filed his bill in equity, the essential matters of which were that a partnership had some years before been formed between himself and Moore, in the ownership and for the conducting of a secular paper, called "The Erie Observer," and which was to continue till the first of the present month, January, 1859, when it was to cease; and as there was no prospect or probability of an amicable adjustment between themselves, as to the manner in which the property and business of the concern should be disposed of, the bill concluded with a prayer for the appointment

of a receiver to take charge of the same. On the return day of the subpoena, which had been awarded, the respondent appeared in court and objected to any such appointment. Under the hopes that the parties might come to an amicable adjustment of their own concerns in the premises, if time were allowed them, further action upon the bill was continued to the present sitting of the court. In the interval, and before the close of the month, *a. fi. fa.* was issued on a judgment in favor of Hulbert's estate against the firm, for something less than \$400, and placed in the sheriff's hands, who closed up the printing office, but made no levy, or at least endorsed none on his writ.

The respondent then on the 29th of December, without consulting his partner, and without his consent or knowledge, so far as the pleadings enable us to determine, made a sale of the entire concern to J. J. Lints, who took possession thereof, and on the first of the present month, issued an extra number of the paper, stating that he had become the purchaser of the press from the late proprietors, and intended to continue its publication. On hearing of this the complainant, on the 4th inst., filed a supplemental bill, to enjoin Moore from selling and Lints from consummating his purchase, or having anything to do with the press and its fixtures. And the same was specially allowed by the president judge of the district at his chambers. To this supplemental bill, the respondents have put in separate answers, in neither of which is the sale denied, but admitted; and it is contended by them, and this more especially by Moore, that, under the circumstances of the case, he had full power and legal right to make the sale. The other respondent contends, however, that as he was enjoined from prosecuting his purchase and has thereby been deprived of the fruits and benefits thereof, he is unwilling to be held responsible for it, and asks that the contract between him and Moore, shall be cancelled, and he have refunded to him the money he advanced to satisfy the execution of Hulbert's estate, and a judgment of Crook & Co., against the firm, amounting altogether to \$607 11, and his promissory note he gave for the residue of the purchase, about \$2300, returned to him.

To the answer and prayer of Lints, the complainant has filed

a replication in which, among other things, he denies that the other paid the money he contends for, or that if he did, it was through a fraudulent combination between him and Moore, to prejudice the rights of the complainant in the press, &c., and further, that even if it were otherwise, the respondent, Lints, has no right to a decree as against him, for the repayment of the money advanced and the return of the note.

These are the material averments in the bill, answers and replications, and the first question that arises out of them is, had Moore the right to sell the entire establishment to Lints? That one of two or more partners may, under certain circumstances, dispose of the entire property of the firm, and thus cut short the further continuance of the partnership, need not be questioned; but the circumstances must be peculiar, indicating perhaps, that no other possible or reasonable remedy presented itself to save the concern from an impending irreparable loss or injury. Was there such a peculiarity in the facts connected with this case? The *fi. fa.* in the sheriff's hands was for less than \$400, and the complainant was a resident of the city, equally interested with the other partner in the ownership of the press. The parties do not appear to have been on very friendly terms, and when the sale was made to Lints, it was without consultation with, or knowledge of Moore. It was therefore precipitate and illegal. Would the complainant himself have been justified in the same position of facts, in making a similar sale? Hardly, and if he had attempted it, his partner would have had just cause of complaint. To tolerate an act of this kind, would be making one partner the arbiter of the other's rights, and allowing him to fix the price and terms of payment, of what belongs to his associate equally with himself, and would destroy the equilibrium which the law recognises as existing between members of the same firm. The sale then, being illegal, the complainant's only sure and safe remedy was, in the course he took, to arrest its progress. The act of sale was against law and prejudicial to the rights of the complainant and to prevent its consummation the injunction was properly allowed, and is now made perpetual. In doing this, however, we cannot overlook the fact, that money was advanced by some one, Lints or Moore, to prevent a sale of the property on the exe-

cution ; and as the latter admits in his answer that it was by the former, who claims for himself that it was so, it would be but just and equitable that the same should be refunded out of the proceeds that may be made from the sale of the property by a receiver. But a difficulty presents itself to the carrying out of this purpose from the charge of fraud made by the complainant in his replication, for if this existed between the defendants, it would cut short the right of either to the claim set up for the money advanced.

If therefore, this charge or allegation of fraud is persisted in, a different decree from the one intended, might have to be made.

The notes we make no order or decree about.

They originated between the defendants themselves, and will consequently, have to be adjusted by the same parties. The consideration of them having failed, their payment cannot be enforced unless they were commercial in their character and had been passed into innocent hands, which is not likely to be the case. The sale then to Lints, being illegal and the parties unwilling or unable to make an arrangement respecting the property of the firm, it becomes the duty of the court to interpose between them, for their mutual interests and benefits, and in some measure to preserve the peace and order of the community, which is liable to be innovated upon, when any of its members are in a state of hostility towards each other. Indeed it is a matter of course, to have a receiver appointed to take charge of partnership effects, upon the dissolution, if the firm cannot or do not harmonize in their views as to the mode of disposition to be made of them. To see that this is done, is one of the ends for which courts are instituted, and it would be an inexcusable departure from legal exactions, if it should not be done in the present instance. We therefore order and decree that J. W. Douglass, Esq., be, and he is hereby appointed receiver, to take charge of the printing office of "The Erie Observer," with all its effects and incidents as they belonged to the late firm of Sloan & Moore, and that he dispose of the same as early as practicable to the best advantage and interests of the joint owners thereof ; and that the best and highest price may be obtained therefor, it is further ordered and directed that until a sale is made, the regular weekly issue of the paper be continued by the receiver, in a manner least unexcep-

tionable, considering its hitherto political affinities and business course. It is further ordered and decreed that the said receiver pay to the said J. J. Lints, out of the first moneys that may be realized from the concern, not interfering, however, with the regular issue of the paper until a sale is perfected, the sum of \$607 11, with interest from the 29th of December last.

It is also further ordered, that the receiver take an inventory of the goods, property, and effects of the partnership, and report the same to this court by the 15th day of February next, and what disposition he has made of the same, and whether the paper has been issued by him as was ordered; and for the faithful performance of his duties, the said receiver be required to give good security, to be approved of by the court, or one of the judges or prothonotary thereof, in the sum of \$5000.

The costs in this case are reserved for further consideration,

Affirmed, 1 Wright 217.

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*In the District Court of Allegheny County.*

PITTSBURGH AND STEUBENVILLE RAILROAD COMPANY v. CLARKE  
& THAW.

(Vol. VII., p. 129. 1859.)

Where on trial, plaintiff at bar amends his declaration in matter of substance, to which defendant, alleging surprise, refuses to plead or demur, but moves for a continuance, it is the duty of the court to grant the motion.

THIS was a rule by plaintiffs to show cause why the continuance ordered by the court should not be taken off, and the cause restored to the trial list.

*George P. Hamilton and Craft*, for plaintiffs.

*Loomis*, for defendants.

The following opinion was filed, July 9th, 1859, by  
HAMPTON, P. J.—The extraordinary circumstances attending

the origin and progress of this rule, entitles it to more than ordinary consideration.

When grave and respectable counsel, after mature deliberation, charge the court with having inflicted upon their clients "a great wrong, amounting to a denial of justice," the facts and the law, upon which such charge is founded, should be carefully examined, and its truth or fallacy clearly shown.

The superiority of the wisdom of the present age, over that of the past, may be admitted, perhaps, without destroying all our confidence in long-settled rules and well-established precedents in the science and practice of law, and, unless overthrown by reason and sound argument, such rules and precedents may still be entitled to some weight in the administration of justice. The modern custom of charging the courts with ignorance, or something worse, whenever their decisions happen to run counter to our own peculiar views or opinions, is one which, perhaps, would be more honored in the breach than the observance. Such a practice can lead to no good, but may result in much mischief to the community. That courts do sometimes fall into error, is readily conceded, which only shows that judges are not infallible, but liable to the infirmities common to the whole race. That injuries are sometimes inflicted on suitors, by the decisions of our courts, is doubtless true; but that clients are liable to, suffer occasionally from the oversight, neglect, or want of skill of their attorney, will scarcely be denied.

The facts, therefore, in this case, as in all others and the law applicable thereto, must determine whether the charge made by counsel be well founded, or otherwise.

This suit was brought on the 29th of May, 1856, at which time the plaintiffs' counsel filed his declaration in assumpsit, setting forth "That the said defendants on the 14th of July, 1851, at Pittsburgh, in said county, did subscribe for one hundred shares of the capital stock of the said Pittsburgh and Steubenville Railroad Company, of the value of fifty dollars each, and thereby became liable and undertook and promised to pay to the said plaintiffs the sum of five thousand dollars, when they, the said defendants, should be thereunto afterwards requested; and, although the said defendants did afterwards pay divers moneys,



to wit, the sum of five hundred dollars, yet they have not paid the residue of said moneys, whereby they have become liable to pay the sum of forty-five hundred dollars, with the penalty of one per cent. per month thereon, from and after the first days of August, 1852; October, 1852; December 1, 1852; January 1, 1853; February 1, 1853; March 1, 1853; April 1, 1853, and June 1, 1853." The declaration then concludes in the usual form, as in actions of *assumpsit*.

To this declaration the general issue was put in, which plea remained on the record till the 19th September, 1857, when it was withdrawn, and the plea of payment was pleaded. On this issue the cause was tried on the 21st September, 1857, and a verdict and judgment were rendered for the plaintiffs, for the balance admitted to be due on twenty shares of stock, the remaining eighty shares having been transferred, on the books of the company to E. M. Stanton, Esq., and credited to the defendants. The validity of that transfer and credit were the only questions in dispute. The cause was removed to the Supreme Court, and the judgment reversed on the 5th of December, 1857, and a new trial awarded.

On the 18th of December, 1858, the defendant's counsel moved the court for leave to file an additional plea, based on the following affidavit, viz: A. W. Loomis, being duly sworn, says that the filing of the foregoing plea will affect the merits of the cause, and is essential and necessary to the said defendant's defence, and that the filing of said plea, and consequent change in the pleadings, is not desired for any other reason. The plea accompanying this affidavit was, that the defendants "did not undertake or promise, in manner or form, as the plaintiff has above thereof complained against them." Of the change thus made in the pleadings, the plaintiffs had notice at the time.

The plaintiffs were thus warned by the defendants' affidavit that the plea affected the merits of the case, and, by the plea, that the defendants denied that they had undertaken or promised, in manner or form, as alleged in the declaration. This was, certainly, sufficient to put the plaintiffs on their guard—to induce them to look well to the "manner and form" of their declaration. That every legal objection would be interposed to prevent

their recovery, and that they should not rely on anything that might have taken place at the former trial, as the ground of defence then relied on had been swept away by the Supreme Court, and that entirely new grounds would be assumed, on the next trial. Notwithstanding all this, the new plea remained on the record from the 18th December, 1858, till the 1st of April, 1859, when the cause came up for trial, without any application on the part of the plaintiffs to amend their declaration.

On the issue thus formed the jury were sworn, and the plaintiffs proceeded with their proof. When they came to offer evidence of the calls for the instalments having been made, agreeably to the provisions of the Act of Assembly, so as to entitle them to recover the penalty of one per cent. a month, the defendants' counsel objected to its admission on the ground of irrelevancy and incompetency. Instead of calling on him to state more specifically the grounds of his objection, the plaintiffs' counsel were willing to run the risk of a bill of exceptions. The defendants' counsel seemed quite content that the court should admit the evidence without argument, but insisted on his exception. The court, however, was not quite so indifferent, and called upon the defendants' counsel to state specifically his reasons for the objection. This brought to light the fact that the plaintiffs' declaration was fatally defective, so far, at least, as the penalties were concerned, which, at the time suit was brought, amounted to over \$1800; and it admits of some doubt whether the amount of the subscription itself could have been recovered under the declaration, as it then stood on the record, as no allusion whatever was made to the Act of Assembly authorizing the subscription, and no averment that the installments had been called in. When this defect in the plaintiffs' declaration was thus very fortunately discovered, the counsel at once saw the necessity of an amendment, and very properly applied to the court for leave to amend their *narr.*, so as to conform to the requirements of the Act of Assembly, and embrace the penalty of one per cent. a month for the non-payment of the installments called in. Leave was promptly granted by the court, and a new declaration was drawn up at bar, entire and complete, under the Act of Assembly, covering the whole cause of action, both the subscription and

the penalties. The old declaration, which consisted of but one count, was thus entirely superseded, and although not formally withdrawn from the files, became *eo instante* a dead letter upon the record. In *Kay v. Fredregal*, 3 Barr 221, it was held that where an amended declaration is filed, by leave of the court, it is virtually a withdrawal of the first; and if the parties go to trial under such circumstances, it is to be presumed it was had on the amended declaration, when nothing appears to the contrary.

After this amendment was made, the defendants' counsel alleged surprise, and moved the court to continue the cause. The plaintiffs' counsel resisted this motion, and called upon the defendants' counsel to plead or demur to the new declaration; they also contended that no new plea was necessary, that the plea to the old declaration was as applicable to the new as to that. The defendants' counsel declined to answer the amended *narr.*, or to consider the plea already in as applicable thereto, but insisted on his right to have time to plead or demur, as he might deem most expedient, and to prepare his testimony, if necessary, accordingly.

The court, at the time, being of opinion that the amendment was indispensably necessary to enable the plaintiffs to recover the penalty, if not the principal, and that the new count formed an entirely new declaration, to which it was necessary either to plead or demur, granted the continuance, and the question now is whether that continuance was right or wrong? If right, the rule is to be discharged; but if wrong, it must be made absolute.

It is too well settled to need specific reference to cases, that a jury cannot be sworn until an issue of the fact be formed for them to try. But here was no issue of fact or of law in relation to the penalty, if indeed there was in respect to the subscription itself. A verdict, therefore, without a plea to the amended count could only be for the subscription, without the penalty. But it was said that the plea already in was applicable to the count, and therefore the court should have compelled the defendants to proceed. It is very true that the plea to the first declaration was applicable to the second, if the defendants chose to put it in, or consider it as pleaded. But without such consent, either express or implied, what right had the court to order the

plea so to be considered? The defendants' counsel refused either to plead, or to consent to go on without an issue, but claimed the right to plead or demur at his option after mature deliberation. What power had the court, then, to proceed with the trial? The plaintiffs sought to recover some two thousand dollars in the shape of a penalty, more than had been legally claimed in the original declaration. No answer had been put in as to this penalty, and the jury had not been sworn as to it. There must be an issue of law or fact on this new declaration, otherwise there could be no decision upon the plaintiffs' right to recover the penalty. But the defendants refused to tender such an issue, and the old issue which the jury were sworn to try had been virtually withdrawn. If the court had forced the trial at the time, the plaintiffs would have lost the benefit of their amendment, because the verdict could only have been entered on the issue joined upon the first declaration. If the defendants' counsel had not objected to going on with the trial, even without a plea being formally put into the new count, it would have been presumed after verdict that the former plea was extended by consent to that count. But this could only arise from the assent of the defendant's counsel, to be inferred from the fact that he went on to trial without objection. But no such assent can be inferred in the face of an objection to the contrary.

Suppose the trial had been commenced and was progressing in the absence of the defendants and their counsel, and the plaintiffs had discovered the necessity of the amendment, made application for leave and it had been granted, and the amendment made, could it be pretended that the plaintiffs could have proceeded with the trial, and that a verdict and judgment, including the penalty, could have been sustained? The penalty, amounting to some two thousand dollars, could not have been recovered under the first declaration; and, as we have already seen, there was no issue in regard to it. The defendants had neither admitted nor denied their liability, and until an issue of fact was formed, there was nothing for the jury to pass upon.

But suppose the court had admitted the evidence offered under the defective declaration, which no doubt the defendants' counsel desired should be done, the Supreme Court would either have reversed the judgment and sent the cause back for another trial,

or, what is much more likely, would have affirmed the judgment for the amount of the subscription, and reversed as to the penalty. In the latter case the plaintiffs would have lost over two thousand dollars of their claim. So that after all that has been said about the great wrong inflicted on the plaintiffs by the court, perhaps they are rather more indebted to the vigilance of the court than their counsel seem to be willing to admit.

A few authorities will here be cited to sustain the foregoing principles.

In *Bratton v. Mitchell*, 5 Watts 70, it was held that a party cannot be compelled to try until the cause is put into legal form by an issue properly formed between the parties on the record. When an objection is made, there is no reason for presumptions of any kind, and it would be against right and justice to infer an agreement to waive form, in opposition to the protestation of the party against the trial.

When the plaintiff files a new count, the defendant should plead a new plea to it, and if he does not he is entitled to a continuance: *Le Roy v. Delaware Mutual Ins. Co.*, 2 W. C. C. R. 223; *Rankin v. Cooper*, 1 Browne 253.

Where a plaintiff amends his declaration during the trial, and defendant pleads to it, and takes his chances for a verdict, it is too late to object: *Shriner v. Kellar*, 1 Casey 61.

When a case is not at issue, it is error for a court, in the absence of counsel, to go to trial on it: *Ensley v. Wright*, 3 Barr 501.

By looking into the old English practice, from which our own is derived, we find it laid down that before plea there can be no costs payable upon amending the declaration, except the costs of the application; and the declaration may be amended in matter of form, after the general issue pleaded, and before entry, without paying costs or giving imparlance; but if the amendment be in matter of substance or after the general issue is entered, or a special plea pleaded, the plaintiff must pay costs, or give an imparlance, at the election of the defendant. On amending the declaration after plea pleaded, the defendant is at liberty to plead *de novo*, and has two days allowed him for that purpose, after the amendment made, and payment of costs. And if a rule to plead be entered the same term the amendment was made, though before such amendment, it is sufficient. Otherwise a new rule to

plead must be entered: 1 Tidd's Prac. 653; 1 Salk. 517-18. Amendments were allowed on equitable terms, whether in form or substance, while the proceedings were *in passu*, but so that the other side may not be prejudiced (2 Burr. 756), as paying costs, not delaying the adverse party, giving him time to plead *de novo*, which is generally two days after amendment made, or as the nature of the case may require: 2 Sillon's Prac. 454.

When there are several counts in a declaration the defendant may, according to the nature of his defence, demur to the whole, or plead a single plea applying to the whole; or may demur to one count and plead to another, or plead a several plea to each count; and in the two latter cases the result may be a corresponding severance in the subsequent pleadings, and the production of several issues. To several counts, or to distinct parts of the same count, he may plead several pleas, viz. one to each: Stephen on Pl. 268-9.

These are some of the authorities going to show that even before the cause was set down for trial, on filing a mere count, or amendment in matter of substance by the plaintiff, the defendant was entitled to an imparlance, and could not be called upon to plead instanter. And the only alteration in the practice made by the English and Pennsylvania statutes is, that the amendment may now be made on, or during the trial, which could not be done before.

I have looked in vain for authority to show that the court has power to compel a defendant to plead instanter to a new count filed by leave of court, either on or before the trial. Nor have I ever known an instance where the exercise of such a power was attempted. And if the court had directed the trial to proceed without plea or issue, against the protestation of the defendants, the only legitimate result would have been a reversal by the Supreme Court, at the cost of the plaintiffs, and the consequent delay of the determination of the cause. From such a result, the plaintiffs have only been saved by what they are pleased to call a great wrong inflicted upon them by the court.

Rule discharged.

And the refusal to grant a continuance after amendment is not the subject of a writ of error: *Walthour v. Spangler*, 7 Casey 523; *Evans v. Clover*, 1 Gray 164; *Insurance Co. v. Simmons et al.*, 6 Casey 299.

*In the Supreme Court of Pennsylvania.*

## VANDRESOR v. KING.

(Vol. VII., p. 130. 1859.)

An action on the case will lie against an officer who disregards the provisions of the Act of April 9th, 1849, by selling personal property required by the defendant in the execution to be appraised and set off to him.

## ERROR to the Common Pleas of Erie county.

Vandresor, the defendant below, was a constable who levied an execution in his hands on property of King, the plaintiff, and sold the same, refusing to comply with plaintiff's request to select appraisers and have the property so levied on set off to him, the said King, under the Act of 1849. King brought suit in case against the constable. Defendant asked the court to instruct that plaintiff could not recover in this form of action, that his remedy was trespass. The court (Derrickson, A. J.) charged that the action was proper, and plaintiff recovered a verdict.

*James C. Marshall*, for plaintiff in error, contended that trespass and case were not concurrent remedies—that a boundary always existed between them: *Scott v. Shepherd*, 2 H. Blackstone 895; *Reynolds v. Clarke*, 2 Ld. Raym. 1402; *Leame v. Bray*, 3 East 598; *Cotteral v. Cummings*, 6 S. & R. 348. Trespass and not case was the remedy here: 3 S. & R. 139; 12 Id. 210; 4 P. L. J. 183; 6 Casey 344; 4 Id. 238; 6 Id. 264.

*William A. Galbraith*, for defendant in error, cited 1 Jones 155; 1 Cro. Eliz. 824; 2 N. & M. 114; 1 B. & C. 145; 6 Cowen 392; 14 Johns. 432; 3 S. & R. 215; 7 Watts 62; Chit. Pl. 139.

The opinion of the court was delivered, October 31st, 1859, by THOMPSON, J.—In *Wilson v. Ellis*, 4 Casey 238, afterwards recognised in *Smith v. Freeman*, 6 Id. 264, it was determined that trespass would lie against a sheriff or constable for neglecting or refusing to give the defendant in the writ the benefit of the

\$300 Act, when it had been properly demanded. It was so ruled upon the principle, that the abuse of authority under the writ, made the officer a trespasser *ab initio*, and placed him in the same situation as if the writ had been void; for he was not entitled to use it as a justification, in consequence of his disregard of the requirements of the law in executing it. There are many authorities for this, not to be doubted or disputed. But it was not determined that case would not lie under such circumstances. Trespass and case assimilate as remedies often. And this is the case when they approach the dividing line, as they often do, so closely, as scarcely to be distinguishable from each other, and where no evil is perceptible from adopting either as a remedy. But this does not obliterate the distinction; for as they recede from the point of assimilation, the distinction becomes manifest and the form of action to be adopted obvious. Such as trespass for a wilful injury to property, and case for injury by neglect; or trespass for a battery, and case for slander and the like.

There is no doubt, but that trespass in cases like the present will lie, but it is sustained by the employment to some extent of a fiction, namely, the want of a writ to justify under, because the party has abused it. It is, however, obvious that the more natural and direct remedy would have been an action founded on the breach of duty, in refusing or neglecting to allow the debtor's demand of the provisions of the Exemption Law. For a neglect of duty, case is generally the remedy. In the execution process, the law requires the officer to appraise and allow the debtor to elect and retain property to the extent of \$300, if there has been a demand. This is a duty enjoined, a breach of which occasions the injury, and for such an injury occasioned in such a way, no doubt case will lie, as for a breach of duty. The argument that because trespass may be sustained, case cannot, is sound to the extent only of those manifest indications which exist in force directly applied, and where it is not so, there the distinction is clear. The remedies are distinct and must generally be followed. It is true, however, that case is a more extensive remedy than trespass, for it is often within the province of the party to waive the trespass and recover for the consequential



injury. This has frequently been ruled in England. The cases of *Smith v. Goodwin & Richards*, 2 N. & M. 114, and *Branscomb v. Bridges*, 1 B. & C. 145, cited by the defendant in error, and 1 Chit. Pl. 139, clearly show this; so in New York: *McCallister v. Hammond*, 6 Cowen 392. In Pennsylvania there are many cases to show that the remedies are sometimes concurrent: *Ream v. Rank*, 3 S. & R. 215, case for debauching plaintiff's daughter, *Tilghman, C. J.*, said "that to support trespass, a fiction is resorted to, viz.: that the defendant committed an assault upon the woman. I will not say that such a fiction, resting upon long practice, may not be supported, it is not material in what form the suit is brought, provided the cause be tried on its merits, but I may safely say, that a different form, in which truth is told, and fiction discarded, is not only maintainable, but most proper." And *Duncan, J.*, said, "force is implied, when a daughter or servant had been enticed away or debauched, and trespass may be supported, though case for the consequence of the wrong appears to be the more proper form of proceeding." See also *Hoover v. Heim*, 7 Watts 62. A recovery in either form of action would be a bar to an action for the same cause in any other form. As when the trespass is waived and assumpsit or trover is brought, either would bar an action of trespass. So trover or replevin may be concurrent remedies, and one action would bar the other.

We are of opinion that case would lie for the injury complained of here, or that trespass would have lain, and as the learned judge of the Common Pleas ruled that the action was well brought, this judgment must be affirmed.

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*In the Supreme Court of Pennsylvania.*

JESSE ACHMUTZ v. SHIPPEN ACHMUTZ.

(Vol. VII., p. 143. 1859.)

1. In ejectment based upon an alleged trust, depending on no written evidence, but sought to be made out from the acts and declarations of the

parties, through a series of years and down to the death of the alleged trustee in possession, the question of the trust is one peculiarly for the jury.

2. In such case, if, on a review of the parol evidence, the court should pronounce it insufficient to divest a paper title, thereby ruling the case against the defendant, without the aid of the jury, the Supreme Court would be obliged, on writ of error, to re-examine the evidence minutely.
3. Where juries overthrow paper titles in behalf of those resting in parol, the Supreme Court will sometimes look into the proofs on which they proceeded; but where a party is unable to persuade a jury that he has a parol title, he will find no relief in a writ of error.

**ERROR to the Court of Common Pleas of Northumberland county.**

The opinion of the court was delivered at Pittsburgh, October 31, 1859, by

WOODWARD, J.—This is a dispute between the descendants of two brothers as to which of them owned the land. The patent of 15th May, 1821, vested the title in Robert, but it was claimed he held it in trust for Arthur, as to the land in dispute.

As this alleged trust depended on no written evidence, but was to be made out from the acts and declarations of the parties, through a series of years and down to the death of Arthur in possession, it was a question peculiarly for the jury. And the court submitted it fairly to the jury. If, on a review of the parol evidence, the court had pronounced it insufficient to divest a paper title, they would have ruled the case against the defendant without the aid of the jury, and we should have been obliged, on writ of error, to re-examine the evidence minutely.

But, instead of ruling against the trust, they submitted the whole case to the jury, who did not find it in the evidence. What have we to do with the verdict or the evidence on which it was founded? Really, nothing. Where juries overthrow paper titles in behalf of those resting in parol, we sometimes look into the proofs on which they proceeded; but where a party is unable to persuade a jury that he has a parol title, he will find no relief in a writ of error.

So as to the only other ground of defence—the statute of limitations—it became a question of fact which the verdict ruled

conclusively. The effect of Robert's assignment and of the possession maintained by Gable & Scarfoss, were correctly stated in point of law, and the finding that twenty-one years' adverse possession had not been made out, left the defendant without pretence of title.

The judgment is affirmed.

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*In the United States Circuit Court for the Western District of Pennsylvania.*

ADAMS v. LAWRENCE COUNTY. WOODS v. SAME.

(Vol. VII., p. 145. 1859.)

1. The Act of Assembly of 9th July, 1853, section 7, authorizing certain counties to subscribe to the capital stock of the Northwestern Railway Company, which provides that the counties may "make payments on such terms and in such manner as may be agreed upon by said company and the proper county," confers, by such provision, full authority upon the county to issue coupon bonds in payment of such subscription.
2. All doubts as to this being the proper construction of the said section are dispelled by the following considerations:
  - 1st. Because the legislature themselves have so construed it, the proviso to the said section being "that whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by said railroad company at less than par value," &c., which shows that the legislature took it for granted that the issue of bonds was intended to be included in the brief but comprehensive expression of the "manner in which payment may be made."
  - 2d. All parties concerned have treated this as the true construction, and have acted under it accordingly.
  - 3d. The matter has been before the Supreme Court of the state (8 Casey 144), and it does not there appear that the county ought to have the bonds enjoined as made without authority. The decree there is based on the doctrine that these bonds are binding on the county in the hands of *bond fide* holders.
3. The said bonds, so issued, in the hands of *bond fide* holders, who have obtained them at their market value, are not affected by the proviso of the act, "that whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by said railroad company at less than par value."

*Geo. P. Hamilton and W. O. Leslie* for plaintiffs.

*R. B. McCombs and Lewis Taylor* for defendant.

The following opinion was delivered November 17th, 1859, by GRIER, J.—These cases were tried together at the last term of this court in May. The plaintiffs sued as holders of coupons of interest due on certain bonds issued by Lawrence county, the defendant.

There was not much dispute as to the facts on the trial. The two great questions involved were:—first, Had the Commissioners of Lawrence county legal authority to issue the bonds given in evidence; and, second, If they had, how far the fact that the bonds were disposed of for less than their par value should affect the plaintiffs' right to recover.

In order that the court might have time for a more careful consideration of the questions, the jury were requested to bring in a special verdict, subject to the opinion of the court on these questions.

The execution of the bonds and coupons not being disputed, the jury returned a verdict finding the disputed facts, and assessing damages under three conditions, subject to the opinion of the court.

*First.* They find that the bonds were disposed of by the railroad company, at twenty-five per cent. less than their par value, and if the court shall be of opinion that the Commissioners of Lawrence county had authority, under the Act of 9th July, 1853, and the recommendation of the grand jury, as given in evidence, to issue the bonds, and that the plaintiff has a right to recover the whole amount of the coupons declared on, notwithstanding the fact, as above stated, then they find a verdict of \$1958 60.

*Second.* But if the court should be of opinion that plaintiff can recover only in the same ratio that the bonds were sold—for less than their par value—then the court to enter a verdict and judgment for \$1468 95.

*Third.* But if the court shall be of opinion that by reason of the sale of said bonds for less than their par value, the plaintiff is not entitled to recover anything, they will enter a verdict for defendants.

The question as to authority is one of great importance, as it affects not only a large number of bonds, issued by the county

defendant, but the counties of Beaver and Butler, which are in the same category.

The Act of Assembly, referred to in the verdict, of 9th July, 1853, is that which provides for "incorporating the Northwestern Railroad Company."

The third section enacts that the company shall have a right to construct a railroad from some point on the Pennsylvania or Allegheny Portage Railroad, west of Johnstown, by way of Butler, to the Pennsylvania and Ohio state line, to some point on the western boundary of Lawrence county, &c.

The seventh section, which alone confers any power on counties to subscribe for stock in this railroad, is as follows:

"Section 7.—That the counties, through parts of which said railroad may pass, shall be, and they are hereby severally authorized to subscribe to the capital stock of said railroad company, and to make payments on such terms and in such manner as may be agreed upon by said company and the proper county. Provided, that the amount of subscription by any county shall not exceed ten per cent. of the assessed valuation thereof; and that before any such subscription is made, the amount thereof shall be fixed and determined by one grand jury of the proper county, and approved by the same; upon the report of such grand jury being filed, the county commissioners may carry the same into effect by making, in the name of the county, the subscription so directed by the said jury: Provided, that whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by said railroad company at less than par value, and no bonds shall be in less amount than one hundred dollars, and such bonds shall not be subject to taxation until the clear profits of said railroad shall amount to six per cent. upon the cost thereof, and that all subscriptions made or to be made in the name of any county, shall be held and deemed valid, if made by a majority of the commissioners of the respective counties."

The presentment of the grand jury is as follows:

"The grand inquest of Lawrence county, Pennsylvania, did, on the 21st of May, 1853, make the following resolution:

"*Resolved*, That the commissioners of the county of Lawrence,



body, whose statutes are more usually obscured by a multiplication of words than by indefinite brevity, it cannot be presumed that so great and dangerous and corrupting a power was intended to be delegated in such vague language. It was easy to say, that the commissioners should have authority to pledge the credit of the county by the issue of bonds with coupons for the payment of interest half yearly, if the legislature so intended. That the power "to make payment on such terms and in such manner" may be satisfied, in many ways, without such an expansive construction as has been given to it. Besides it cannot be presumed that the extent of authority granted to the county commissioners, or the mode of its execution, would, by any prudent legislature be conferred on them at the discretion of a private corporation. That here was an attempt to delegate legislative power to them, if they may dictate the "manner" in which such a vague and dangerous power may be exercised. I must confess that when this question was first ventilated these and other arguments of defendant's counsel had caused much doubt in my mind, inasmuch that the court offered to certify a division of opinion in order to have the matter fully settled at Washington. And perhaps, if the case before me were a bill to enjoin the commissioners from issuing these bonds, I might have come to a different conclusion, but after consultation with my colleague, and more mature consideration, the doubts at first entertained have been dispelled.

*First.*—Because a legislative construction has been given of this same section showing that they did intend to authorize the issue of bonds in the name of the county. Modern legislation can seldom be understood without carefully noting the provisos. Instead of exceptions the provisos often contain the very pith and marrow of the statute, which without it would be unintelligible or absurd. Here the proviso clearly shows that the legislature took it for granted that the issue of bonds was intended to be included in the comprehensive, but brief and costive expression.

The "manner" in which payment may be made.

*The 2d.*—All parties concerned have treated this as the true construction, and have acted under it accordingly. The bonds have been issued, without a whisper of dissent as to the power of

the commissioners to make them, and this sharp construction is not demanded till the convenience of total repudiation has been discovered. But the court will not now repudiate their own practical construction of the law, to enable them to repudiate the obligations made under it.

*Third.*—This matter has been before the Supreme Court of the state. See 8 Casey 144. In that case it does not appear that the county ought to have these bonds enjoined because made without legal authority. The ground alleged in the bill, and proven to the satisfaction of the court, was the gross fraud practiced by the officers and first subscribers of stock to that company. The decree in that case is based upon the doctrine that these bonds are binding on the county in the hands of *bond fide* holders. That point seems to have been conceded both by court and counsel. Else why decree that the company should pay to the county the par value of the bonds and interest due, if they do not surrender them?

The objection that the grand jury have not "fixed and determined" the amount to be subscribed, but only "recommended," is a verbal criticism which might well have been urged on a bill to restrain the action of the commissioners. If Acts of Assembly are drawn in such a careless, slipshod style, how can we expect accuracy of expression in the report of a grand jury? They, no doubt, intended it as a literal compliance with the statute; it was accepted and acted upon as such. In such a case a court ought not to be astute in verbal criticism, to release parties from their contracts, after their faith has been pledged for the redemption of these securities and value received for them.

II. The bonds having been executed by the commissioners according to the powers conferred on them, and delivered to the railroad company in payment of stock, who have paid them to contractors, who have again passed them to laborers and other *bond fide* holders, for their market value, how are they affected by the last proviso of the act, "that whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by said railroad company at less than par value."

On the trial, the fact that the plaintiff was a *bond fide* holder



of these bonds, was not put in issue, and is assumed in the special verdict, which "finds the bonds that were disposed of by the railroad company at twenty-five per cent. less than the par value."

This is a duty imposed on the railroad company, the original payer of the bonds. The company receives them at their par value for stock in the road, which is presumed to be a complete equivalent. But if the bonds, which are received as cash, are not of that value, it would be a fraud on the other stockholders, who paid in money or its equivalent, if the county could pay for a hundred dollars of stock in a depreciated currency worth only seventy-five dollars. Besides, the bonds being made negotiable security, payable to bearer, the county would have to pay their bond and interest, whether that bond purchased a hundred dollars' worth of work or materials, or only fifty.

This is no condition precedent, which affects the covenants on the bonds. It assumes that the bonds have been issued and given in payment of stock, and imposes this prohibition as a restraint upon both the county and the railroad. The county should not subscribe unless they are sure that the state of the money market is such that their securities will be worth par; nor should the railroad accept subscriptions, to be paid in such securities, unless they were equivalent to the cash paid by other stockholders. Now, if these bonds were expected to be mere common bonds, not negotiable, but passing only as an equitable interest to the assignee, this proviso of the act would have been unnecessary, as the county might have set up this as a defence against the company and their assignees. It would not effect a forfeiture of the bond, but the county might well plead that it would pay no more to the company than it had contributed to the stock by its bond.

It is apparent, also, that the imposition of this duty upon the railroad is founded on the fact that the bonds given to them would be negotiable securities, to be put into the market as a sort of currency, and binding the obligor to pay the bearer according to the exigency of the bond. The proviso evidently assumes that fact and is founded on that hypothesis.

The recitals of the bonds are to show the power of the com-

missioners or agents of the county to bind it by subscription for stock, and pledging the faith of the county by such public securities. If the power has been legally executed, the bearer, to whom the county has contracted to pay, has no concern with intermediate holders. Whether the commissioners and the company may (one or both) have been guilty of fraud in issuing these securities, the bearer or *bond fide* holder need not inquire. If the corporation has wronged the county in this transaction, it does not concern the holder of the bond. He has a right to presume that both parties have acted honestly and according to duties prescribed to them by the act. The bearer of the bond, who has purchased it in market for its market value, has a right to say to the county, "You have put forth your bonds in the shape of a negotiable security, payable to bearer; you have covenanted to pay me certain sums at certain times; you have delivered these securities or sold them for certain stock; you have your consideration; I have your bond. If the railroad has cheated you, see you to it. It is no concern of mine. 'It is not so written in the bond.'"

It appears by the report of the case above cited that these bonds were fraudulently obtained by the officers of the railroad company, and that the company was ordered to deliver up all the bonds in their possession, and to pay the par value of all the bonds put in circulation by them. Why has the county asked for such a decree, and why should the court have made such a decree, unless upon the admitted principle that the county were bound to pay such of these securities as were put into circulation according to the exigency of their contract? That, though technically bonds, yet by the custom of the country they were negotiable securities, and the county, by the letter and spirit of their contract, were bound to pay the bearer the whole amount.

The face of the bond gave notice to every one who received it, on what legal authority it purported to be executed. A purchaser was bound to inquire whether the bonds were executed by persons having authority to pledge the faith of the county. Their delivery may be presumed from the fact that they are found in the market; whether the agents of the county or the railroad had been guilty of fraud or folly, in the course of their

transaction, were facts of which the face of his bond did not put the holder on the inquiry, and the knowledge of which would not affect his legal right to recover.

The county cannot make a speculation out of the folly or fraud of their agents, as they certainly would if they recover the amount of their bonds from the company and themselves refuse to pay them to the legal holder. They cannot allege in one court, as foundation for a decree, that they are bound to pay the bonds, and deny it when sued on the bonds in another.

The court are of opinion, therefore, that, according to the conditions of the special verdict, the plaintiff has a right to judgment for the sum of \$1958 60, and so order.

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*In the United States Circuit Court for the Western District of Pennsylvania.*

LIVINGSTON, COPELAND & CO. v. JONES, WALLINGFORD & CO.

(Vol. VII., p. 169. 1859.)

1. A party using contrivances to supplant another in the use of a patent, by obtaining the assignment of the extended term thereof, and by his answer to a bill in chancery and his cross bill under oath, claiming the ownership of the extended patent, and praying injunction from its use against the other party—is to be regarded as admitting both the value of the patent and its originality.
2. The originality and validity of the Sherwood patent of Janus or double-faced door locks, investigated and established.

THIS was a proceeding in chancery, the nature and character of which appear fully in the opinion of the court. It was argued at May Term, 1859.

*Edwin M. Stanton*, of Washington City, *Shaler & Co.*, and *Bakewell & Cushing*, of Pittsburgh, for complainants.

*George C. Gifford*, of New York, *George P. Hamilton*, and *Stowe & Hampton*, of Pittsburgh, for respondents.

The following opinion was delivered, November 17th, 1859, by

GRIER, C. J.—The parties to this bill are two manufacturing firms in the city of Pittsburgh. They are both engaged in the manufacture of door locks.

The complainants claim to be the owners of a patent granted to John P. Sherwood, for an improvement in door locks, issued, originally, on the 14th of December, 1842, and afterwards extended for seven years, from the 17th of December, 1856.

The bill charges the respondents with infringing this patent. The respondents' first answer admitted the use of the patented invention, but claimed that they are the true owners of the extended patent, and by a cross bill they prayed that complainants might be enjoined from using the invention.

After the testimony had been taken on both sides upon this issue involving the title to the patent, the respondents, discovering that they must necessarily be defeated, obtained leave from the court to withdraw the answer and cross bill which admitted the validity of the Sherwood patent, and to file another answer denying its originality and validity.

This being the only question in the case, it is necessary to notice further the history of the patent, its renewals, and assessments.

Till within a few years past, most of the door locks used in this country were imported from England. It was an important object, therefore, to discover or invent some plan by which this article could be made cheaper and better than the imported, notwithstanding the higher price of labor here. Such an inventor who by bringing his invention into market could expel the foreign article, would evidently be a public benefactor, the article of door locks being one of immense consumption in this country. This object was in part effected by making the locks of cast iron. But another difficulty in the way of their cheap production, was found in the fact that door locks had to be made right and left, and a lock made for a right-hand door would have to be turned upside down in order to be used on a left-hand door, and *vice versa*. It became, therefore, a very important object to those who manufactured and to those who dealt in this article, that this difficulty of right and left hand locks should be somehow

obviated, and that every lock might be equally capable of use on right or left hand doors.

Sherwood was the first to invent a mode of effecting this object. But as it required the expenditure of a large capital and much enterprise to make and establish in the market a new manufacture of this kind, the invention was not put into successful operation. The inventor had not the capital necessary, and failed to persuade others who had, to embark in the speculation. The complainants having embarked in the manufacture of door locks, and properly appreciating the value of Sherwood's invention, sought out the inventor and purchased his patent, and have now succeeded in establishing a manufacture both cheaper and better than that imported.

There is no better evidence of the value of this invention than the contrivances used by the respondents to supplant the complainants, by obtaining the assignment of the extended term of the patent, which they must have known has been obtained by the money and active exertions of complainants and for their use. Their conduct proves their apprehension of the value of the patent, and their oath on record admits of its originality.

After such a course of conduct they must be held to make a clear case of mistake in the patent office and in their own sworn answer, as regards the originality of this invention.

The patent is for a "new and useful improvement in door locks."

The schedule states that every part of the lock may be made of cast iron, as the cheapest material, but does not claim that as the patentee's discovery.

The first improvement claimed is in the case, which is to be made double-faced, and the schedule points out the form and mode of making the castings for such cases.

The second improvement is in making the bolt with notches, as described, so as to put them, by simple reversion, to a right or left hand door.

The claim, which it is admitted that respondents infringe, is as follows:

"What I claim as my invention, and for which I desire an exclusive right by letters-patent, is, making the cases of door-locks and latches double-faced, or so finished that either side may be

used for the outside, in order that the same lock or cased fastening may answer for a right or left hand door, substantially as described."

Simple as this improvement may appear at first view, it is clear it had never before been suggested or put in practice for the purpose of making a better manufacture at a cheaper rate. Before this patent door-locks had not been so made, nor had it occurred to any one that by these simple contrivances this manufacture could be thus improved and cheapened.

The respondents, in support of the issue tendered by them, of want of novelty, have not pretended to prove that any one had ever manufactured Janus faced door-locks with this device, intending thereby to obviate the difficulty of having right and left hand locks.

But they have given evidence concerning certain locks on gates, which, having been necessarily made with close faces on each side, it is supposed might, if used merely as dead locks, have been applied either to right or left hand gates.

The complainants have taken the wise precaution of purchasing all these old locks and producing them in court *in propria persona*, accompanied also by the testimony of the manufacturer of the only one whose age is satisfactorily established to be older than the patent.

An examination of these locks, is much more satisfactory than the examination of the testimony of witnesses calling themselves experts and delivering opinions.

Not one of these locks was intended to be a right and left hand or Janus faced lock. The custom house lock is from an open out-door gate. Its inside is necessarily covered tight to preserve the works of the lock from the weather and from rust—a device necessary in all out-door gate locks. It is not suited and never was intended for a Janus faced lock. It is evidently finished on one side only. It is a left hand lock and is not a door lock at all.

The lock taken from the city hospital gate is a dead lock, a right hand lock. By putting it wrong side out and making some alterations, it might be converted into a left hand dead lock. The same may be said of the gate lock of St. Mark's church and all the others. The mechanic who made the custom house lock in 1840,

swears that it was intended and finished only as a left hand lock. That he never thought of a Janus faced lock and never manufactured one, but had different patterns for right and left hand locks.

It is abundantly clear from the inspection of these locks that the makers of them were not in search for a plan for Janus faced locks, or aware of the value of such an invention. They may have stumbled over it, but not seeking it did not think it worth picking up or examining. As in many other cases they were near the invention, and might have made it if they had only thought of it. Those who are wise after the event, and who have been examined as experts, have given testimony which when analysed amounts to this, and no more; that these gate locks being covered on the inside, might by a little change have been made into Janus faced locks, though not so intended by the maker. The fact is now apparent to a mechanic who has seen the patented invention before him.

Experience has caused me to have little confidence in the opinions of experts and professors, who often have more knowledge than judgment. Courts and juries may be much benefited in their researches, by the one, while they would be led into great error by confiding too much to the other.

The art of printing was stumbled over for five thousand years, and if a patent for it were now presented to our expert, he would show you at once that the whole art consisted in multiplying impressions from a combination of movable types. He would point you to the tracks of animals as original impressions from movable types and show the invention of printing letters to be as old as Adam.

Few patents could stand the test of such ingenuity as this. Incredible as it may appear yet it is nevertheless true, that on the trial of the originality of Morse's telegraph, it was gravely argued that two thieves in the penitentiary, who had corresponded by means of scratches and dots on the prison wall, had preceded Morse in the invention of this most astonishing and useful art.

We are of opinion, therefore, that the defendants have not succeeded in establishing the defence pleaded in their amended answer, and that the complainants are entitled to the decree prayed for in their bill.

*In the Circuit Court for the Western District of Pennsylvania.*

CALVIN ADAMS v. JONES, WALLINGFORD & Co.

(Vol. VII., p. 170. 1859.)

1. Where an inventor has made application for a patent, the delay afterwards interposed either by the mistakes of the public officers or the dilatory proceedings of courts, where gross laches cannot be imputed to the applicant, cannot affect his rights.
2. A man may justly be treated as having abandoned his application if it be not prosecuted with reasonable diligence.
3. If an inventor claims two distinct improvements in one machine, he may apply for them jointly and have a single patent for them both. If he has made a mistake as to one of the improvements claimed, but is clearly entitled to a patent as to the other, he cannot be justly said to have abandoned either during a litigation as to his right to both.
4. Patterson's patent for a concave bevelled keeper, held to be an immaterial variation of Adams' patent for an "improved keeper for right and left hand door locks," worthless as an improvement, and palpably got up as a cover and to give color to an invasion of rights.
5. The novelty of the Adams improvement examined and affirmed.

BILL in equity for injunction.

The opinion of the court states the case fully.

*Edwin M. Stanton*, of Washington, D. C., *Shaler & Co.*, and *Bakewell & Cushing*, of Pittsburgh, for complainants.

*Geo. C. Gifford*, of New York, *Geo. C. Hamilton*, and *Stowe & Hampton*, of Pittsburgh, for respondents.

The following opinion was delivered Nov. 17, 1859, by

GRIER, J.—The complainant has a patent dated 24th February, 1857, for an "improved keeper for right and left-hand door locks."

It purports to be for an improvement in the manufacture of an article, now known under the appellation of "Janus faced door locks." That species of lock was invented and patented by Sherwood. But in order to accommodate it to either a right or left-hand door, it was necessary to open it, so as to change the bevelled side of the bolt. When this was done by a careless or inexperienced workman, the internal works of the lock were lia-



ble to become displaced. The object of complainant's invention is to obviate this difficulty. It is accomplished by making the bolt blunt, with rounded edges, and making a keeper, whose lip is an inclined plane the whole length of the keeper, so that the lock is available for either a right or left-hand door, without opening it to change the bolt, as the keeper may be turned with either side up, and catch the bolt.

This is, undoubtedly, a valuable improvement in the manufacture of "Janus faced door locks," as it simplifies and cheapens the article. Drop catch keepers had before used a slightly inclined plane on the lip of the keeper, but it could be used only for such a door as they were specially made for.

The original application for a patent for this invention was made by Adams in 1850. In that application the inventor, now patentee, is clearly and distinctly set forth and claimed. But the applicant claimed also to be the inventor of other improvements. The commissioner of patents refused to grant him a patent for anything. An appeal was taken to the Circuit Court, and not decided by that court till 1856, when the decision of the commissioner was affirmed. Notwithstanding this, the original application was not withdrawn, and the applicant continued to insist upon his right to a patent for so much of the improvements claimed as was clearly his invention. A new commissioner of patents, having the sagacity to see that the applicant had made a valuable invention which had been overlooked by his predecessor, and rejected because the application had included other improvements of which the applicant was not the original inventor, very properly granted the patent now before us, as a valuable improvement in the manufacture of that species of locks called "Janus faced."

The respondents in their answer allege three several grounds of defence.

1st.—They contend that the patent is void because the improvement therein claimed had been put in public use more than two years prior to the date of the patent.

2d.—That respondents do not infringe, but act under a patent granted to one Patterson in 1857.

3d.—That the improvement claimed is not new.

1st.—As to the first point of defence. The testimony shows that the complainant made and sold locks with this improvement, more than two years before his patent, but after his original application filed in 1850. By this application Adams fully disclosed to the public his invention and gave notice of his intention to demand a patent. He ought not to lose his rights because of the want of perspicacity of the first commissioner. The delay in the decision of the appeal was not in consequence of any laches of complainants, but of the inability of the aged chief justice to attend to the business of his office.

The reasons why courts have declared patents to be void, because the inventor had suffered his invention to be used by the public, before his application for a patent, are well stated in the case of *Pennock v. Decalogue*, 2 Peters 1.

“If an inventor should be permitted to hold back from the knowledge of the public, the secrets of his invention; if he should for a long period of years, retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure; and then, and then only, when the danger of competition should force him to procure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what should be derived under it during his fourteen years; it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries.”

By the Act of 3d of March, 1859, this abandonment to the public must have existed more than two years prior to the “application” for a patent.

By the application filed in the patent office, the inventor makes a full disclosure of his invention and gives public notice of his claim for a patent. It is conclusive evidence that the inventor does not intend to abandon it to the public. The delay afterwards interposed either by the mistakes of the public officers or the delays of courts, where gross laches cannot be imputed to the applicant, cannot affect his right.

The statute forfeits the right of an inventor to a patent only where the invention has been in public use more than two years

before the application. A man might justly be treated as having abandoned his application if it be not prosecuted with reasonable diligence. But involuntary delays not caused by the laches of the applicant should not work a forfeiture of his rights. In this case the complainant did not commence the manufacture of his improved lock till some time after his application was on file. The delay was not a consequence of his laches, and within a reasonable time after the decision of the court as to the extent of his invention, a patent was granted for that portion of it to which he was clearly entitled. Here is no abandonment, either by the letter, or spirit of the statute, but a continual claim amidst difficulties arising either from the obtuseness of officers or accidental but unavoidable delays of public tribunals.

If an inventor claims two distinct improvements in one machine, he may apply for them jointly and have a single patent for both. If he has made a mistake as to one of the improvements claimed but is clearly entitled to a patent as to the other, he cannot be justly said to have abandoned either during a litigation as to his right to both.

2d.—As to the question of infringement.

We have had ocular demonstration by an examination of the respondents' admitted manufactures that they palpably infringe the invention patented to complainant. When we have the things before our eyes (*oculis subjecta fidelibus*) we want no opinions of mechanics or experts and give no further reason for our opinion than that "we've seen and surely ought to know."

If the patent to Patterson be good for anything (being only a change of the device invented by complainant, for the worse), it is only for an improvement on his invention. It must have been granted on that supposition.

The locks exhibited show a substantial identity with Adams's invention with a palpable attempt to make a colorable variation. It is plain also that this patent of Patterson for an immaterial variation, is worthless as an improvement, and palpably got up as a cover, and to give color to this invasion of complainant's rights. To clearly vindicate this conclusion of the court, it would be necessary to have the things before us, and a *viva voce* explanation. For the present we can only say such is our undoubted

conviction from careful personal explanation of the things themselves.

3d.—The defence of want of novelty is wholly unsuccessful. The spring bolt brought from Birmingham, clearly shows that the device invented by Adams to improve Janus-faced locks, had never entered into the conception of the maker of it. As the bolt was only partially bevelled, he had somewhat inclined the lip of the catch to make it slide with more ease.

Everything which we have said with regard to the New York gate locks, got up to defeat the Sherwood patent, applies with double force to the rusty sample brought to our notice from Birmingham. In both cases, the defence amounts to no more than this—that the persons who made these supposed originals came so near the patented device or machine, that they might have discovered it, if they had only thought of it, or could have anticipated that at some future day it could be converted to some useful, practical purpose, for simplifying, cheapening and improving an important article of our manufacture.

It is only when some person by labor and perseverance has been successful in perfecting some valuable manufacture, by ingenious improvements and labor-saving devices that their patents are sought to be annulled by digging up some useless, rusty, forgotten contrivances of unsuccessful experiments. Let a decree be entered for complainant according to the prayer of the bill.

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*In the District Court of Allegheny County.*

ADAMS v. AVERY'S EXECUTORS.

(Vol. VII., p. 178. 1859.)

1. Where an attachment is served on a garnishee, before suit brought on the claim attached, he is bound to plead it in abatement, and cannot give it in evidence under the plea of payment with leave, etc. Having pleaded payment in bar, he will be precluded on trial from pleading in abatement.
2. Money coming to a party only as a trustee, cannot be attached for his individual debt.
3. The pendency of an attachment will not avail to defeat the right of recovery.

ery in a *bonâ fide* holder, for value, before maturity, of a negotiable note, without actual notice before he received the note.

THE history of this case is given in the following opinion of Judge Hampton, delivered Nov. 26th, 1859.

*Mitchel & Palmer*, for plaintiff.

*Robb & McConnell*, for defendants.

HAMPTON, J.—This is an action on a promissory note, of which the following is a copy :

“\$1000 00

PITTSBURGH, May 1, 1858.

Two months after date, we promise to pay to the order of Joseph Bryan, Trustee, at the Exchange Bank of Pittsburgh, one thousand dollars with interest, without defalcation, for value received.

THOMAS M. HOWE,	} Executors of Chas. Avery.”
WM. M. SHINN,	
JOSIAH KING,	

This note is endorsed “Joseph Bryan, Trustee; John C. Adams; Josiah Lee & Co.; S. Jones & Co.; the last two endorsements being erased. It was duly presented for payment at maturity, at the Exchange Bank, by A. S. Bell, Notary Public, at the instance of S. Jones & Co., the holders, and protested for non-payment.

After the note was admitted in evidence, the plaintiff's counsel offered the protest, for the purpose of showing that S. Jones & Co., who were subsequent endorsers to the present plaintiff, were the holders of the note, at its maturity. The notary was in court, but the defendants' counsel waived the necessity of calling him, and the protest was admitted under exception, for the purpose for which it was offered. With this evidence the plaintiff closed his case.

The defendants' counsel offered in evidence the record of the District Court, No. 868, July Term, 1858, (prout same) as follows :

James Barrett and James Barrett, Jr.	} Foreign attachment. Issued on the 5th of June, 1858—served on
v.	
Joseph Bryan & R. H. Bryan, partners.	

Josiah King 5th June 1858, and on Shinn & Howe, the 7th June, 1858. The plaintiff's affidavit and copy of his account are for \$2100 36.

Judgment was rendered on the 30th June, 1859, sum due to be liquidated according to the provisions of the Act of Assembly. This evidence was offered for the purpose of putting the plaintiff upon proof of his title to the note.

The plaintiff's counsel objected to the evidence, on the ground that it was inadmissible under the pleadings—that it should have been pleaded in abatement, and could not be given in evidence, under the plea of payment with leave, &c.

The court admitted the evidence, for the time being, and reserved the question.

The defendants offered no other evidence, and there being no question of fact for the jury to pass upon, the court directed a verdict for the plaintiff *pro forma*, subject to its opinion, on the following questions of law, which were reserved for the decision of the court in banc.

1st. Whether the evidence offered by the defendants' counsel be admissible under the pleadings?

2d. Whether, if admissible, it constituted a good and valid defence?

First, then, as to the admissibility of the evidence under the pleadings. The plea is payment with leave, &c., which I suppose means, with leave to give the special matter in evidence. Not having the defendants' affidavit before me, I will suppose the special matter referred to was the pendency of this attachment, which might, perhaps, be strained to amount to a special plea of that proceeding in bar, which is the utmost that can be claimed by the defendants.

It has been held by the Supreme Court, in a number of cases, that an attachment must be pleaded either in abatement or bar, according to the progress of the proceedings when the plea is put in. Thus, if the attachment be served on the garnishee before suit brought on the claim attached, the garnishee is bound to plead in abatement, but if afterwards, he may plead it specially in bar: *Irwin v. The Lumbermen's Bank*, 2 W. & S. 190; *Maynard v. Nekervis*, 9 Barr 81. Matter properly pleadable in

abatement cannot be pleaded in bar, and, inasmuch as the attachment was pending when the suit was brought, it was the defendants' duty to plead it in abatement, and not having done so, but having pleaded payments in bar, they will be precluded now from either pleading in abatement or giving it in evidence under their plea.

This disposes of the first question reserved, and, in fact, of the whole case. But in order that both questions involved may go up together and be disposed of by the Supreme Court, we will proceed to examine the second point, viz. : Even if the evidence were admissible, would it be available as a defence ?

Under this branch of the case, two questions arise : 1st. Could this money be attached for the debt of Joseph Bryan, when he was only a trustee, and so far, we are informed by the evidence, had no interest whatever in the fund ? The question itself furnishes its own answer. As well might money coming to an executor, administrator or guardian be attached for their individual debts, which will not be asserted by any one.

2d. Could the pendency of this attachment prevail to defeat the right of the plaintiff to recover without actual notice, before he received the note ? The evidence shows that he was a *bond fide* holder for value before the note matured ; and there is not a tittle of evidence going to show actual notice of the existence of this proceeding when he took the note. The note, as we have seen, was dated the 1st of May, payable in two months, the attachment was served on the 5th and 7th of June, and was protested on the 8d of July, at the instance of S. Jones & Co., subsequent endorsers to the present plaintiff.

The very question presented here was ruled by the Supreme Court in *Keiffer v. Ehler*, 6 Harris 888, where it was held that an attachment execution is unavailable against a *bond fide* holder, for value, of a negotiable note, where the note was obtained after the attachment was served on the maker of the note, as garnishee, and after its return, before the maturity of the note, and without actual notice of the attachment. The doctrine of implied notice, by *lis pendens*, is not applicable to such a case.

And in *Hill v. Kroft*, 5 Casey 186, it was held that the amount due upon a negotiable note, may be attached in the hands of the

maker ; but such attachment is unavailing as against a holder, to whom the note was endorsed after the attachment, and without notice thereof. The law, therefore, is too well settled, on both questions reserved, to require further comment.

Let judgment be entered on the verdict in favor of the plaintiff, on payment of the verdict fee.

*Updegraff v. Spring*, 11 S. & R. 188 ; *Derham v. Berry*, 5 Phila. 475.

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*In the Supreme Court of Pennsylvania.*

BANK OF LAWRENCE COUNTY v. LAWRENCE COUNTY.

(Vol. VII., p. 199. 1859.)

The Supreme Court has no authority to review the order or decree of the Common Pleas in the distribution of money collected on a forfeited recognisance in the Quarter Sessions.

CERTIORARI to the Common Pleas of Lawrence county.

*McGuffin*, for plaintiff in error.

*McCombs & Taylor, contra.*

The opinion of the court was delivered, November 3d, 1859, by

LOWRIE, C. J.—This is a case of the distribution of money collected on a forfeited recognisance in the Quarter Sessions. It comes here by certiorari at the instance of the Bank of Lawrence County, which complains that it did not get its due share of the money, under the Act of 30th July, 1842, §§ 26, 27.

We are of opinion that this court has no authority to review the order or decree of a Court of Common Pleas, for it is expressly declared to be final and conclusive, and because the case is not such a judicial one as falls necessarily within the general jurisdiction or judicial power of this court. And we do not think that this court ought to have any power over such cases ; for, properly speaking, they involve no juridical questions. They have no relation to the preservation or enforcement of private



rights; but only to the distribution of money belonging to the state, and which it bestows upon counties and persons according to such rules and by means of such instrumentalities as it pleases. It makes the judges of the Common Pleas the functionaries for its distribution, and their decree final, and therefore we must not interfere. The Act of 22d April, 1846, § 6, is somewhat similar; but it does not make the decree final and conclusive. The Commonwealth v. Robbins, 2 Casey 165, was under that act, and it is intimated there that we were without authority, but not decided, because no party raised the question.

Certiorari quashed and recommitted.

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*In the Court of Common Pleas of Allegheny County.*

PITTSBURGH AND CONNELLSVILLE RAILROAD CO. v. WATSON.

(Vol. VII., p. 201. 1860.)

Formation of issue, for assessment of damages in cases of appeal where lands or materials are taken for railroads or other roads, discussed, and directions given therefor.

THIS opinion, filed at No. 117, October Term, 1859, is the basis for the new rule of court. The facts are sufficiently detailed in the opinion of the court, which was delivered by

MELLON, A. J.—In this case an order for an issue was made by the court, and at the same time objected to on behalf of one of the parties, and a rule obtained to show cause why it should not be set aside. The objection is not to an issue, but to this particular form of issue. It is intimated, too, that many other similar cases await a general order of the court on the subject of the issues to be formed therein.

The Act of Assembly on which this proceeding is based, and the General Railroad Act, and the Lateral Railroad Act, and the act relating to turnpikes and plank roads, are *pari passu*, so far as they relate to the assessment of damages, or so nearly so, that a general rule as to the issue to be formed on an appeal under

any one of them, may, with slight variation, by the pleader, as to the form, be made applicable to all.

It is the right of the party representing the road to enter and appropriate the land or materials necessary for its location and construction, and it is his duty to define the extent of such appropriation. It is a compulsory sale, and the question is as to the price. Naturally, therefore, the landowner is the claimant or plaintiff, he has the affirmative and ought to be made the plaintiff in the issue, under whatever form the cause may appear on the record.

The object of the issue is to enable the parties to prepare their evidence, with a view to the points in controversy, and to enable the court and jury intelligently and conveniently to apply the law and the evidence. Brevity, simplicity, and natural order of statement, are most conducive to this end. The forms of feigned issue found in the books would be faulty in this respect, and inapplicable under these special proceedings; and a glance at the issue prepared and ordered for this case, will show its tendency to confuse all parties. It makes the railroad company the plaintiff, requires it to set a price on the land taken, and on the supposed advantages to the landowner, and consequently gives the company by this forced method the affirmative, and leaves the landowner to controvert the price set on his property by another, and requires him to state the value of the injury he will sustain (a rather novel expression). It puts him in the position of filing a replication to a declaration or statement of the plaintiff, which is incongruous, and requires him to state the value of the advantages which he will derive from the road, a fact which few landowners seeking damages are willing to admit. Then the points raised by this issue are unauthorized in law. That is, although proper subjects of investigation and consideration, the law does not authorize them to be split up into distinct counts, and made the subject of separate findings, as in this issue set forth. The only act under which such an issue would apply, so far as my recollection serves me, is the act incorporating the Ohio and Pennsylvania Railroad Company. That act does require the advantages and disadvantages to the owner to be inquired of, and found separately, and the difference added to or

deducted from the value of the land taken. The acts under consideration require the advantages and disadvantages resulting to the owner of the land from the making and use of the road, to be taken into consideration, but does not require separate and distinct issues to be raised thereon. The viewers or jury, under the acts referred to in the outset, "are merely to consider in their estimate of damages, the benefit as well as the injury which the owner has or will sustain:" 2 Harris 247.

There is ample time to form an issue in a more simple and convenient form before the closing of the next trial list. I will therefore make the rule of the 31st ultimo, taken on behalf of the company to set aside the order of that date for an issue, absolute, and leave either party to procure an issue under the general rule made by the court this day for such purpose.

#### NEW RULE OF COURT.

##### *Issues for Assessment of Damages.*

And now, January 7, 1860, it is ordered by the court, that on all appeals in damage cases for lands or materials taken for railroads, turnpikes, plank roads or lateral railroads, an issue shall be made and formed as follows, viz.:

SECTION 1. The owner of the land or materials shall be made the plaintiff.

SECT. 2. The plaintiff shall file a statement of claim as nearly as the exigencies of the case will admit of in the following form:

*Statement of claim.*—The said ——— complains that said ——— have (or has) located their road upon, and are about to enter into and occupy, for the purpose of making said road, a certain piece (or pieces) of land, of which he, the plaintiff, is seised in fee (or such other interest or estate as he has therein), and which said piece of land is situate and described as follows (plaintiff may describe and define the land for himself, if he thinks the diagram filed with the petition or award incorrect, or he may describe it by reference merely to such diagram and description thereof made by defendant); and that such piece of land, with the improvements and appurtenances, so taken as

aforesaid, is of great value, to wit, of the value of ——— dollars; and by reason of such taking and appropriation thereof, and the manner of the separation thereof from his, the said plaintiff's, other lands, and by reason that the disadvantages resulting to him from said road, so to be made and used, greatly exceed the advantages by him to be derived therefrom, he has and will sustain great injury, and will suffer damage to the amount of ——— dollars, and which amount of damages ought of right to be paid to him, but payment thereof is refused by the said ———, and therefore he brings suit. (This form may be varied to suit the facts of the particular case.)

SECT. 3. Such statement of claim being filed, the plaintiff may serve a copy thereof on the defendant, which shall be taken and regarded in all respects as a rule to plead, on five days' notice; and the defendant thereupon shall plead or demur, or file such counter statement as will join issue on one or more material allegations or averments of the plaintiff, or plead in confession and avoidance thereof; and such allegation or averment as is not so traversed or avoided, will be taken on the trial as confessed; and the defendant, in like manner, after the appeal is entered, may have rule on the plaintiff, as of course, to file his statement of claim, on five days' notice; and either party in default, after service of copy of statement or rule aforesaid, may be taken as waiving the right to a trial by jury, and the court, on motion, may make such further order as will procure an issue to be joined, or enter such final judgment against the party so in default as to justice may belong.

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*In the Supreme Court of Pennsylvania.*

PITTSBURGH AND STEUBENVILLE RAILROAD COMPANY v.  
PROUDFIT.

(Vol. VII., p. 227. 1860.)

The officiating as a judge of an election of an incorporated company, is a waiver of any alleged condition attached to the subscription for its stock, and renders such subscription absolute.

ERROR to the Common Pleas of Washington county.

The history of this case is the same as the preceding one of the same company *v. Biggar*, 10 Casey 455, with the additional fact, that Proudfit, the defendant here, acted as judge of an election of the company, and, exclusive of the principle decided in *Biggar's Case*, was thereby held to have waived the condition in his subscription, under the fifth section of the General Railroad Law.

*Craft and Hamilton*, for plaintiffs in error.

*Acheson and Wilson and M<sup>r</sup> Kennan*, for defendant in error.

The opinion of the court was delivered January 3, 1860, at Philadelphia, by

STRONG, J.—What we have said in the case of the same plaintiffs against *Biggar*, disposes of this case. To that we refer.

But there is another fact found in the case stated which is significant. The defendant acted as a judge of an election, held by the corporation after its charter was granted. Under the law, which he was bound to know, no one but a stockholder could thus act. This was, therefore, admitting his membership. It was an act inconsistent with any other supposition than that he was either a subscriber, or an assignee of stock. Even if the alleged condition attached to his subscription was valid, it was in his power to waive it, and his acting as a member of the corporation can only be construed as a waiver. It was so construed in the case of *Livingston v. The Same Company*, decided at Pittsburgh in 1858: 2 Grant 219. If the defendant was a member, his membership could not be divested by the failure of the company to locate the road within half a mile of Florence. Conditional membership is an absurdity. There was an absolute right to call for the stock, and of course a corresponding right to demand payment. It is argued, however, that, though defendant's participation in the government of the corporation estopped him from denying a valid subscription, yet it was no evidence of the terms of that subscription. But the law determines that there can be no subscription before commissioners but an absolute one, consequently, when he virtually declared it valid, he at the same time declared it absolute.

The judgment is reversed, and judgment is entered upon the case stated, for the plaintiffs, for two hundred and twenty-five dollars, with interest, at the rate of twelve per cent. per annum, from the time when the several instalments became payable, to wit, in all for \$412 42.

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*In the District Court of Allegheny County.*

CURTIS v. KEARNEY.

(Vol. VII., p. 241. 1860.)

1. To maintain a *scire facias quare executionem non, sur* judgment confessed on a replevin bond with warrant of attorney annexed, it is not necessary that a *sci. fa.* suggesting breaches of the condition of the bond, should have been issued, or an allegation that there is a judgment *de retorno habendo* in the replevin suit, made in the *sci. fa.* issued, or entered on the record of the judgment confessed on the replevin bond.
2. That a rule to show cause why judgment of *non pros.* in the action of replevin should not be opened, and in the meantime proceedings stayed, obtained since the issuing of the *sci. fa.*, is still pending, is no barrier, where plaintiffs in the replevin have not used due diligence, to the proceedings on the *sci. fa.*
3. Where the only absolute limit of the defendant's liability is the amount of the penalty, and that is over one hundred dollars, the District Court has jurisdiction of the action.

THIS was a *scire facias quare executionem non, sur* judgment confessed, in the District Court for the county of Allegheny, upon a replevin bond, with warrant of attorney annexed, executed by the defendant, as the surety of William Davidson, to the sheriff of said county, in an action of replevin brought by Davidson and wife against John Greenough and James Sharp, in the Common Pleas of said county, conditioned that the said Davidson and wife "shall prosecute their writ with effect and without delay, and shall and will truly return the property replevied to the said Greenough and Sharp, if it shall be so adjudged, &c., and in all things save harmless and indemnify the said Carter Curtis, sheriff, in the premises, and pay the detention and costs of suit," &c. The sheriff executed the writ by replevying and

delivering the property therein described, of the value of \$58, to the plaintiffs. Judgment of *non pros.*, in default of a declaration, was entered against the plaintiffs in the action of replevin, and an execution was thereupon issued against them for costs; but before it was returned, the Court of Common Pleas granted a rule to show cause why it should be set aside and the judgment opened, and in the meantime proceedings stayed, which rule was pending when the trial in this case took place.

After the judgment of *non pros.* in the replevin, judgment was confessed upon the replevin bond for the penalty thereof, by virtue of the warrant of attorney contained therein, and assigned by the sheriff to the defendants in the action of replevin, who thereupon caused the writ of *scire facias quare executionem non* to be issued thereon for their use. The defendant pleaded payment with leave, &c., and that the court has no jurisdiction, &c.

Upon the trial, the defendant, by his counsel, submitted the following points, viz.:

1. That the court has not jurisdiction of this action, as appears by the condition of the bond upon which the judgment was confessed.

2. That the *scire facias quare executionem non* was improvidently issued, no *scire facias* suggesting breaches of the condition of the bond having been issued, and no allegation that there is a judgment *de retorno habendo* in the replevin suit having been made in the *sci. fa.* issued, nor entered on the record of the judgment confessed on the replevin bond.

3. That the rule to show cause is still pending in the Common Pleas in the action of replevin, and the said case is not finally determined.

The jury returned a verdict in favor of the plaintiff for the penalty of the bond, to be released on the payment of the value of the property described in the writ of replevin, to wit, \$58 and costs of suit in said case, together with costs of suit in the judgment confessed on the replevin bond and in this case, subject to the opinion of the court whether, under the evidence—the same being matter of record—the plaintiff is entitled to maintain his said writ of *scire facias*, and to have execution for the value of the property described in said writ of replevin, together with

costs as aforesaid, and whether the court has jurisdiction of the action, &c.

*Hays* for plaintiff.

*Mellon* for defendant.

The opinion of the court was delivered by

WILLIAMS, A. J.—In this case, instead of a *scire facias quare executionem non*, the plaintiff might have issued a *scire facias* suggesting breaches, and perhaps this would have been the better practice. But under the decision in *Neville v. Williams*, 7 Watts 421, I cannot say that such a course was indispensable. Whether the plaintiff was bound to suggest, in his writ, breaches of the condition of the judgment or bond on which it was confessed, is a question of pleading to be determined by the rules and practice of declaring on bonds with similar conditions. It seems to be settled that in debt on bond with condition, or for the performance of covenants, the plaintiff may declare for the penalty, and assign breaches at the same time in his declaration, or he may declare simply for the penalty, and leave the assignment of breaches till the replication, where he must assign them, if the nature of the plea demand it: *Munro v. Alaire*, 2 Caines 328.

In *The Post Master General v. Cochran*, 2 Johns. 416, the court says, that "the usual course of pleading upon these bonds has been for the plaintiff to declare in debt for the penalty, the defendant to craveoyer, and plead a general performance, the plaintiff to reply and set forth particular breaches, and the defendant to rejoin to those breaches, and take issue thereon." But the plaintiff may assign breaches, in the first instance, in his declaration, and this has been recommended as the preferable mode: *Id.* 415. The *sci. fa.* in this case recites the judgment for the penalty and warns the defendants to show cause why the plaintiff ought not to have execution against them therefor; and, in this respect, it is analogous to a declaration where the plaintiff declares for the penalty without assigning breaches of the condition of the bond. Instead of pleading *nul tiel record* and payment with leave, the proper course for the defendant was to



crave oyer of the condition of the bond or judgment and to plead a general performance, and then the plaintiff would have been compelled to set out the particular breaches on which he relied.

There was no allegation on the trial that the judgment for the penalty had in point of fact been paid; nor was any evidence given tending to show performance of the condition of the bond on which it was confessed. On the contrary, the record in the action of replevin showed the entry of a judgment of *non pros.* in default of a *narr.*, before the issuing of the *sci. fa.* in this case. This failure of the plaintiffs, to prosecute their writ with effect and without delay, was a breach of one of the conditions of the replevin bond and of the judgment thereon, and occasioned its forfeiture. At common law a judgment of *non pros.* was a judgment that defendant have a return of the goods, and upon this judgment, a writ *de retorno habendo* might issue. But the entry of such a judgment is not indispensable to a recovery on the replevin bond: *Gibbs v. Bartlett*, 2 W. & S. 29, and in an action on the bond the value of the property as set out in the writ of replevin, though not conclusive, is *prima facie* the measure of damages: *Id.* 35. On the trial no other evidence of damages was given. The plaintiff is, therefore, entitled (if this case is within our jurisdiction), to a judgment for the penalty and to have execution for the value of the goods replevied, together with costs, as found by the jury.

It is of no consequence that, since the issuing of the *scire facias*, the plaintiffs in the replevin have obtained a rule to show cause why the judgment in that case should not be opened and in the meantime proceedings stayed. If due diligence had been used that rule would have been disposed of long before this case was set down for trial. If the Common Pleas had taken off the *non pros.* in the action of replevin, this court would have granted relief by staying proceedings on the *scire facias* until a trial of the replevin. But the plaintiffs in the replevin not only failed "to prosecute their writ with effect and without delay," but they have been guilty of gross laches in not prosecuting their rule to show cause. The granting of that rule did not relieve the defendants from the consequences of the forfeiture incurred by the failure to prosecute the replevin "with effect and without delay,"

and its pendency cannot take away or defeat plaintiff's right of action, nor prevent him from proceeding to recover damages for a forfeiture previously incurred; indeed this point, if not abandoned, was not insisted on by defendants' counsel on the argument.

The only other question to be considered is, has this court jurisdiction of this action? In the case of a bond with condition for the payment of a specific sum, the real debt, and not the penalty of the bond, is the sum in controversy which determines the jurisdiction of the court. No matter what may be the amount of the penalty, if the real debt does not exceed one hundred dollars this court has no jurisdiction. But the bond, upon which the judgment in this case was confessed, was not for the payment of any definite sum, nor, in case of a breach of its condition, is there any specification or stipulation as to the amount of the damages recoverable for such breach, nor anything by which they could be estimated with reasonable certainty. The condition of the bond is that the plaintiffs in the replevin "shall prosecute their writ with effect and without delay, and shall well and truly return the property replevied, &c., if it shall be so adjudged, &c., and in all things save harmless and indemnify the sheriff in the premises, and pay the detention and costs of suit, &c." If the damages for a breach of all, or any one, of these conditions could not, in any event, exceed the value of the property as set out in the writ of replevin, then it is plain that this court has no jurisdiction of this action. But the value of the property as fixed by the plaintiffs in the replevin is not the limit of defendants' liability. The jury in assessing the damages may exceed the value of the property as stated in the writ. The only absolute limit of the surety's liability is the penalty of the bond. What then is the true criterion for determining the jurisdiction of the court, in the case of a bond for the performance of covenants or collateral acts of any kind, where the damages for the breach of the condition are uncertain, and can only be ascertained or liquidated by the finding of the jury; and where the only absolute limit of the defendant's liability is the amount of the penalty? It seems to me that the jurisdiction of the court, in such a case, depends not on the amount of damages found by the jury, but on the

amount of the penalty of the bond. If the damages are stipulated and certain, then the penalty is to be disregarded. Whether the sheriff had a right to demand a bond with warrant of attorney to confess judgment thereon, is not a question in this case. He might lawfully receive such a bond, if tendered, and have judgment entered or confessed thereon, for his own protection ; and when the judgment in this case was originally confessed how could the sheriff know, or the court ascertain, that the damages could, in no event, exceed the minimum limit of the court's jurisdiction ? If the uncertainty as to the amount of the damages was sufficient to authorize the court to take jurisdiction of the case when the judgment was confessed, our jurisdiction is not ousted by the finding of the jury. In the case of unliquidated damages the jurisdiction of the court is not ambulatory ; it depends upon the penalty of the bond or judgment, and when there is no penalty, upon the amount laid in the declaration. There is nothing to take this case out of the rule here laid down. It is not shown by the record, nor was it by any evidence on the trial, that the subject of the replevin was a distress for rent, and we are not, therefore, called upon to decide whether in such case in an action on the bond, the amount of rent in arrear is the sum in controversy which determines the court's jurisdiction.

And now, to wit, February 16th, 1856 ; this cause came on to be heard on the questions of law reserved on the trial, and was argued by counsel : it is, therefore, considered and adjudged by the court that the plaintiff for use, &c., is entitled to maintain his said writ of *sci. fa.* issued in this case, and to have execution for the value of the property replevied in No. 92, October Term, 1852, and costs of suit in that case and in No. 584, April 4th, 1854, and costs in this case, and that the court has jurisdiction of this action : and it is ordered, that judgment be entered on the verdict by the prothonotary in favor of the plaintiff for use, &c., against the defendant, for the sum of \$200 penalty, to be released on payment of the value of the property described in the writ of replevin No. 92, October Term, 1852, of the Common Pleas, to wit, \$58 and costs of suit in that case, and costs in No. 584, April Term, 1854, and costs in this case, to be taxed ;

and that the plaintiff for use have execution therefor, judgment to be entered on payment of the verdict fee.

Eldred v. Bennett, 9 Casey 183; Weidel v. Roseberry, 13 S. & R. 178  
Kimmel v. Kint, 2 Watts 431; Magill v. Higgins, *infra* 107.

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*In the Circuit Court of the United States for the Western District  
of Pennsylvania.*

OELRICHS & Co. v. THE CITY OF PITTSBURGH.

(Vol. VII., p. 249. 1860.)

1. The remedy for enforcing judgments against counties and townships, provided by the Act of 15th April, 1834, is not applicable to cities.
2. The Act of 1819, directing the levy and sale of stocks in bodies corporate, held by bodies politic, is not repealed by the Act of 1836; and the opinion of the Supreme Court of Pennsylvania in *Lex v. Potters*, 4 Harris 295, concurred in.
3. State laws cannot control the exercise of the powers of the National Government, or in any manner limit or affect the operation of the process or proceedings of the National courts.
4. The whole efficacy of such laws in the courts of the United States depends upon the enactments of Congress. So far as they are adopted by Congress they are obligatory. Beyond this they have no controlling influence.
5. Congress may adopt such state laws directly by substantive enactment, or they may confide the authority to adopt them to the courts of the United States.
6. The Act of Congress of the 19th of May, 1828, adopted the process of the state courts then in use. Any changes by future state legislation to be adopted only by rule of court, at the discretion of the judges of the courts of the United States.
7. At the date of the passage of the Act of Congress of the 19th May, 1828, the law of Pennsylvania of 1819 was in full force.
8. It authorized the stock of any body corporate, owned by bodies politic, like the city of Pittsburgh, to be taken in execution under a *fi. fa.* and sold in the same manner as goods and chattels.
9. The levy by *fi. fa.* on the stock of the defendants in the Pittsburgh Gas Company, held to be legal and proper.

THIS case was argued by Judge *Shaler* for the plaintiffs, and by *Thomas Williams, Esq.*, for defendant.

The particulars fully appear in the opinion of the court, which was delivered, September 20th, 1859, by

M<sup>c</sup>CANDLESS, J.—This case was tried at the late term of the Circuit Court, a verdict rendered in favor of the plaintiffs, and judgment entered on the 23d day of May last. Defendants having failed to file their writ of error, issue their citation, give bail, and remove their case to the Supreme Court of the United States, plaintiffs sued out a writ of *fi. fa.* on the 2d day of September, and levied on 656 shares of the capital stock of the Pittsburgh Gas Company, owned by the defendants, and held in their names on the books of the corporation.

An application is now made to this court to set aside the execution and the levy, upon the ground that the writ of *fi. fa.* is not the proper remedy, and will not lie against a municipal corporation, and that under the law of the state recognised in this court, the process of *fi. fa.* is not the proper one for the seizure and sale of corporation stocks held by the defendants.

The court is impressed with the gravity of the questions presented, and has given to them the consideration which their importance demands.

1. It is contended that the Act of the 15th April, 1834, creating counties and townships bodies corporate, is applicable to cities and boroughs, and that the plaintiffs are limited to the remedy provided in that act. We think not. Cities are nowhere mentioned; except when embraced within a county, it is declared that they shall form a constituent part of it, reserving to them all the franchises conferred by their respective charters. They were independent bodies politic, capable in law of suing and being sued, and of holding real and personal estate. They were not merged in the counties, and being already corporate bodies having all the immunities and subject to all liabilities as such, there was no legal necessity for the application of the law to them. Counties, on the contrary, were nondescript bodies, called by the courts before the passage of the act, *quasi* corporations, against which the creditor had but an imperfect remedy. They were represented by commissioners, as they are now, but with limited and undefined duties and responsibilities: *Vankirk v. Clark*, 16 S. &

R. 290. It was to remedy this defect that the law was passed: Rep. Comm. Civ. Code, January 4th, 1833, p. 5. It would be manifestly impracticable to execute the Act of 1834, as to cities. Upon whom would you serve the writ, which commands the commissioners to pay the judgment out of any unappropriated moneys, or if none, out of the first moneys that may come into the treasury? Upon the mayor who represents the general police of the municipality, upon the controller, treasurer, or finance committee, who may have the custody of the public funds, or upon the select and common councils, the legislative body of the city? The act is silent as to cities. There is no provision rendering the corporation officers amenable to the law for this neglect of public duty.

And when it is remembered that disobedience to the writ is followed by an attachment, and imprisonment for contempt, and a suspension of the functions of all these public officers, so indispensable to the good order and welfare of the city, there must be some positive enactment—something more than the doubtful construction of an act relating to a different body politic, before this court will apply such a remedy. It would be equivalent to the issue of a high prerogative writ, resulting in similar consequences—the assumption and exercise of an extraordinary power, not expressly given by statute.

It has been urged that inasmuch as municipal corporations are clothed with some of the attributes of sovereignty, as for instance the taxing power, they should not be subject to the exigencies of a writ of execution in the hands of the marshal. But the sovereignty delegated is at best of a bastard nature; like a fee, the the highest estate in realty, when coupled with a qualification, it is denominated a base fee. The corporation is limited and contracted in its powers, which is repugnant to all our conceptions of sovereignty.

We now approach the second point submitted:

2. In the early periods of the English law, goods and chattels, or those which are visible or tangible, constituted the great mass of personal property, though the value of them bore no proportion to that of real estate. Bonds, stock, and other evidences of debt were little known or regarded in the law and upon writs of *fi. fa.* the sheriff took only that which could be sold for money. Such

was the law of Pennsylvania until alterations were made by Act of Assembly passed in 1817, in case of an execution against a corporation, authorizing the levy upon current coin of gold, silver and copper, if other personal property cannot be found. And by the Act of 1819, which provided that the stock of any body corporate, owned by any individual or individuals, body or bodies politic or corporate, in his, her, its, or their own name or names, shall be liable to be taken in execution and sold in the same manner that goods and chattels are liable in law, to be so taken and sold. Still, much remained to be done to give creditors the full benefit of the property of their debtors. The Commissioners to revise the Civil Code, recommended an execution to be levied upon bonds, mortgages, credits, &c., as well as upon stocks of incorporated companies: Report 35. This was followed by the Act of 1836, directing the mode of levying upon stocks by attachment and *scire facias*, and by another act of the same year, regulating the levy of executions against corporations followed by sequestration. Municipal corporations are exempted from the operation of both these acts, and it is admitted with great candor, by the learned counsel for the defendant that they are foreign to the case before the court. He contends further that, although these acts afford no remedy against a municipal corporation, that they are part of a general system, which repeals and supplies all former laws. To this it may replied that the Act of 1836, contains no repealing clause, and the Commissioners of the Civil Code themselves, in their report of January 15, 1836, do not treat it so, but say, "in this bill are proposed some important additions to the law." Besides, the Supreme Court of Pennsylvania had this very question before them in the case of *Lex v. Potters*, 4 Harris 295, and decided that the second section of the Act of 1819, above quoted is not repealed by the Act of June, 1836. In this opinion this court concurs.

It becomes us here to inquire how the practice in the courts of the United States is affected by this state of the law in Pennsylvania.

State laws cannot control the exercise of the powers of the national government, or in any manner limit or affect the operation of the process or proceedings in the national courts. The

whole efficacy of such laws in the courts of the United States depends upon the enactments of Congress. So far as they are adopted by Congress they are obligatory. Beyond this they have no controlling influence. Congress may adopt such state laws directly by substantive enactment, or they may confide the authority to adopt them to the courts of the United States: 9 Peters 859.

Examples of both sorts exist in the national legislature. The Process Act of 1789, ch. 21, expressly adopted the forms of writs and modes of process of the state courts, in suits at common law. The Act of 1792, permanently continued the forms of writs, executions and other process then in use in the courts of the United States under the Act of 1789, but with this remarkable difference, that they were subject to such alterations and additions as the said courts should in their discretion, deem expedient. The constitutional validity and extent of the power thus given to courts of the United States, was fully considered by the Supreme Court of the United States, in the cases reported in 10 Wheat. 1 and 51. It was there held, that this delegation of power by Congress was perfectly constitutional; that the power to alter and add to the process and modes of proceedings in a suit, embraced the whole progress of such suit, and every transaction in it, from its commencement to its termination, and until the judgment should be satisfied; and that it authorized the courts to prescribe and regulate the conduct of the officer in the execution of final process, in giving effect to its judgment: 9 Peters 329.

But the present case does not depend simply upon the Acts of 1789 and 1792, but is directly within and governed by the Process Act of 19th May, 1828, ch. 68. The third section declares that writs of execution and other final process issued on judgment and decrees rendered in any courts of the United States, and the "proceedings thereupon" shall be the same in each state respectively, as are now used in the courts of such state. Provided, however, that it shall be in the power of the courts, if they see fit in their discretion by rules of court, so far to alter final process in such courts, as to conform the same to any change which may be adopted by the legislature of the respective state for the state courts.



It results then, that the form of execution (except their style), from the courts of the United States, their force and effect, and the duty of the marshal in levying, advertising and selling, are to be ascertained by reference to the laws of the respective states, as they were on the 19th of May, 1828, except where the judges by rules of court have changed the same: Conk. 464.

This course was no doubt adopted as one better calculated to meet the views and wishes of the several states, than for Congress to have framed an entire system for the courts of the United States, varying from that of the state courts. They had in view, however, state systems then in actual operation, well known and understood, and the propriety and expediency of adopting which they could well judge and determine. Hence the restriction in the act now used and allowed in the several states. There is no part of the act, however, that looks like adopting prospectively by positive legislative provision the various changes that might thereafter be made in the state courts. Had such been the intention of Congress, the phraseology of the act would doubtless have been adapted to that purpose. It was nevertheless foreseen that changes probably could be made in the process and proceedings in the state courts, which might be fit and proper to be adopted in the courts of the United States, and not chosing to sanction such changes absolutely in anticipation, power is given to the courts over the subject, with a view, no doubt, so to alter and mould their processes and proceedings, as to conform to those of the state courts as nearly as might be, consistently with the ends of justice.

The general policy of all the laws on this subject is very apparent. It was intended to adopt and conform to the state process and proceedings, as the general rule, but under such guards and checks as might be necessary to insure the due exercise of the powers of the courts of the United States: 10 Wheat. 60.

What, then, was the law of Pennsylvania, at the date of the passage of this Act of Congress, on the 19th of May, 1828? Undeniably the Act of 1819 was in full force, and it authorized the stock of any body corporate, owned by bodies politic, like the city of Pittsburgh, to be taken in execution under a *fi. fa.*, and sold in the same manner as goods and chattels.

The Act of 1834, relative to counties and townships, was not then in existence. It has never been adopted by rule of court as part of the final process of this court, and with the view we have expressed of its provisions, it cannot be as applicable to cities.

The sequence of this opinion is, that the *fi. fa.* issued in the present case is legal and proper; that the levy upon the stock held by the city of Pittsburgh in the Pittsburgh Gas Works, has been regularly made; that we must refuse the motion to set it aside; and that the marshal must proceed with the execution of his writ.

Motion refused.

See Parke et al. v. Pittsburgh, 1 Pittsb. 218.

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*In the District Court of Allegheny County.*

WATSON v. PITTSBURGH AND CONNELLSVILLE RAILROAD CO.

(Vol. VII., p. 250. 1860.)

1. An Act of Assembly, passed since the adoption of the amended Constitution, revising an act passed previously thereto, which had expired by limitation, must be construed in subordination to its requirements, in the same way as if the original act had never been passed.
2. A provision in the charter of a railroad company, organized under Act of Assembly passed since the adoption of the amended Constitution, which authorizes the company, upon tender simply of the damages awarded by viewers, to enter upon and appropriate land and materials for the construction of their road, without awaiting the issue of an appeal taken by the land owner, is clearly unconstitutional.

MOTION for a preliminary injunction.

*Reed and Thompson*, for complainants.

*Sewell*, for respondents.

The opinion of the court was delivered by

WILLIAMS, A. J.—This case comes before us on an application by the complainant, William Watson, for a preliminary injunction to restrain the Pittsburgh and Connellsville Railroad Company, their contractors, agents and servants, from entering upon his

land and constructing their railroad thereon, as the same is located, until the said company shall tender to him a bond, with sufficient security, for the payment of such damages as he will sustain and be entitled to receive, after the same shall have been assessed agreeably to the provisions of the Act of Assembly prescribing the mode of ascertaining the same, and also to restrain the said defendants from taking stone and other materials from his land for the construction of said railroad, until the rate of compensation for the same be ascertained and paid, as provided by the act incorporating the said company.

There is no dispute in regard to the material facts involved in this application. The complainant is the owner in fee of a tract of land, in Peebles township, in this county, containing about thirty acres, through which—a distance of about 2051 feet—the Pittsburgh and Connellsville Railroad Company, have located their road. At the instance, and upon the petition of the company, viewers were appointed by the Court of Common Pleas of this county, at No. 117 of October Term, 1859, to assess the damages arising to the complainant from the location and construction of their railroad through his land, who awarded to him the sum of \$805 (being about the one-twentieth of the amount claimed by him) and from whose report he has appealed, which appeal is now pending in the said Court of Common Pleas. The company have tendered the complainant the amount awarded him as damages by the viewers, and, under the provisions of the 10th section of their charter, claim the right to enter upon complainant's land and construct their road, as located thereon, and by their contractors, the other defendants in this case, have already entered and commenced the construction thereof.

The provision of the act, under which they justify their entry, is in these words: "*Provided*, upon the payment or tender of payment, by the said company, of the sum specified in the report of said viewers or appraisers, to the owners of said land, the said president and directors of said company, their agents or contractors for making or repairing said road, may immediately take and use the same, without awaiting the issue of proceedings as herein before prescribed"—that is, without awaiting the issue and final judgment on the appeal.

If this proviso of the charter be not inhibited by the constitution, or repealed by subsequent legislation, the defendants are justified in entering upon complainant's land and commencing the construction of their road pending the appeal, without tendering a bond, with security, for the payment of the damages which complainant may be entitled to receive, as it is not denied that they have tendered him the amount awarded by the viewers.

The original act of incorporation containing this provision was passed the 3d of April, 1837, and may not have been subject to the prohibitions in the amended Constitution which was subsequently adopted. But the company was not organized under this act, which expired by its own limitation. By the Act of 18th of April, 1843, the charter was revived, extended and continued in force for a period of five years thereafter, upon the same terms, conditions and limitations as were contained in the original act. Under this latter act the company was organized and in due form, by letters patent, created into a body politic and corporate in deed and law. As this act was passed after the adoption of the amended Constitution, it must be construed in subordination to its requirements, in the same way as if the original Act of 1837 had never been passed.

It is declared, in article 7, sec. 4 of the amended Constitution, that "the legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property, or give adequate security therefor, before said property shall be taken." It requires no argument to prove that tender of the amount awarded by the viewers, where the landowner appeals from their report, is neither making compensation nor giving adequate security, within the meaning of this clause of the Constitution, for the land appropriated by a railroad company for the construction of their road. If it were, the right of appeal, which the law gives, would be little less than mockery; the owner then must either accept the amount awarded by the viewers, if tendered, and so estop himself from prosecuting his appeal, or, if he should refuse it, become liable to have his land taken by a corporation, which may be solvent or insolvent, without any security for compensation

whatever. The framers of the Constitution, or rather the people in adopting it, never could have intended to place the landowner in such a dilemma as this. The provision of the company's charter, so far as it authorizes them, upon tender of payment of the amount awarded by the viewers, to take and use complainant's land for the purpose of making their road, without awaiting the issue of proceedings on the appeal, is clearly unconstitutional, and so the company and the legislature seem to have thought. For, by a supplement to the acts incorporating this company passed the 11th of April, 1856, it is provided "that whenever it shall be necessary for said company to enter in and upon, and occupy for the purpose of making said railroad, any land upon which the same may be located, if the owner or owners of the land shall refuse to permit such entry or occupation, and the parties cannot agree on the amount of damages claimed, the company shall tender a bond, with sufficient security, to the party claiming the damages, the condition of which shall be, that the company will pay or cause to be paid such amount of damages as the party shall be entitled to receive, after the same shall have been agreed upon by the parties, or assessed agreeably to the provisions of the Act of Assembly prescribing the mode of ascertaining the same. That in case the party or parties claiming damages refuse to accept the bond as tendered by the company, the company shall, in every such case, present the bond to the Court of Common Pleas of the proper county, and if the court approve of the security, shall direct the same to be filed for the benefit of those to whom it is given, which bond shall be answerable as all other debts for the amount of the damages assessed, if the same be not paid in a reasonable time after such assessment; and the said company, their agents or contractors for making or repairing the said road, may immediately enter upon and use the said land, without awaiting the issue of the proceedings to determine the damages." It was asserted by the solicitor of the company, upon the argument, that this act was passed at the instance of the company; and that though the act, in terms, is applicable to cases where no proceedings have been commenced for the assessment of damages, its provisions are sufficiently broad and comprehensive to embrace all other cases—as

well those in which proceedings, for the assessment of damages, are pending before viewers or upon appeal, as those in which proceedings have not been instituted—and was doubtless intended not only to supply the omission in the charter as to the latter class of cases, but to make the charter, in this respect, conform to the provisions of the amended Constitution, requiring compensation to be made or adequate security to be given, before taking private property for public use. The injunction must therefore be granted against all the defendants, as prayed for in the first clause of complainant's bill. The company, in the affidavit filed on their behalf, expressly deny that they have authorized the taking of any stone or materials from complainant's land for the construction of their road. But it is not denied that the other defendants are proceeding to take stone and other materials for this purpose. The injunction will therefore be awarded against the other defendants named in the bill, as prayed for in the last clause, but refused as against the company.

Let the preliminary injunction issue, upon complainants giving bond to the defendants, in the sum of \$2500, in pursuance of the provisions of the Act of Assembly in such case made and provided, to be approved by the court.

Decree for preliminary injunction to be drawn by the counsel of complainant, in accordance with the instructions contained in the foregoing opinion.

Reitenbaugh v. The Chester Valley Railroad Company, 9 Harris 100.

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*In the District Court of Allegheny County.*

HILL & CURRY v. ROBERTSON.

(Vol. VII., p. 258. 1860.)

The sheriff's return to a writ, as between the parties to an action, is conclusive, and parol testimony to contradict or control it is inadmissible. It can only be impeached in an action against the sheriff.

No. 41, April Term, 1852. Rule to show cause, &c.

*Magraw* for the rule.

*A. H. Miller, contra.*

The opinion of the court was delivered by

WILLIAMS, A. J.—This is a rule to show cause why the service of the writ of summons and all subsequent proceedings in this case, should not be set aside, on the ground that the writ was not legally and properly served.

The sheriff's return, endorsed on the writ, is in these words: "served by leaving copy at the Monongahela House, the boarding house of the defendant, with John M'Donald Crossan, the proprietor of the said house, by order of plaintiffs' attorney, as per endorsement on this writ, February 24, 1852; so answers," &c.

The rule was granted on the allegation, verified by affidavit, that the Monongahela House was not, at the date of the service of said writ, the boarding house or residence of the defendant. Depositions were taken by the plaintiffs, and read on the argument, for the purpose of disproving the allegation upon which the rule was granted, and establishing the correctness of the sheriff's return. The discussion at bar turned mainly on the question whether, at the date of the service of this writ, the Monongahela House was, in point of fact, the residence of the defendant, within the meaning of the act directing the mode in which writ of summons shall be executed, in cases where the defendant cannot conveniently be found, and where he resides in the family of another. But the view which we take of this case renders the decision of this question unnecessary.

The sheriff's return is "served by leaving a copy at the Monongahela House, the boarding house of the defendant, with John M'Donald Crossan, the proprietor of said house, February 24, 1852." The other part of the return is immaterial and may be stricken out as surplusage. As between the parties to the action, the sheriff's return is conclusive, and parol evidence is inadmissible to contradict or control it. The case of *Kleckner v. The County of Lehigh*, 6 Whart. 66, strikingly resembles the present, and is decisive of the question raised here. There the sheriff's

return was as follows: "September 19, 1840, summoned Philip Person, personally, this day, by reading the within to him. November 3, 1840, summoned Timothy Weiss, by reading the within to him, and also handed him a copy of the same. The said Person and Weiss are said to be two of the commissioners of Lehigh county; so answers," &c.

Upon the affidavit of Weiss, that he was not, at the date of the service of said writ, a commissioner of the county of Lehigh, not having sworn or subscribed an official oath required by law, nor having acted or officiated as county commissioner, the court granted a rule on the plaintiff to show cause why the service of the writ should not be set aside. Upon the argument of the rule, a number of depositions were read in support of the motion. The court made the rule absolute, on the ground that Weiss, one of the persons served, was not, at the date of the service of said writ, a commissioner of the county of Lehigh, and that service on only one of the commissioners was not sufficient. But the Supreme Court, on a writ of error, reversed the judgment of the court below, and remanded the cause for further proceedings. Rogers, J., in delivering the opinion of the court, says: "strike out the words 'said to be' from the return and the service is absolute and positive on two commissioners, and in that case the court cannot discharge the county on motion, but will leave them to their remedy by action against the sheriff. In *Mentz v. Hamman*, 5 Whart. 150, words of similar import were stricken out as surplusage, and the return held to be conclusive, so as to preclude evidence to contradict or explain it. It cannot be endured that a sheriff can shield himself from responsibility by the use of words of an indefinite character, such as 'said to be,' or 'as he understood,' or 'as he has been informed,' or, we may add, 'by order of plaintiff's attorney.' The sheriff cannot complain of this, as in a proper case he can claim an indemnity, so as to protect himself from any loss that may arise in the discharge of his duty. As the return must be considered absolute and conclusive between the parties to the action, the court erred in setting aside the service of the writ by the introduction of extraneous proofs."

In *Mentz v. Hamman*, it is said that a sheriff's return to a



writ is conclusive between other parties, and can only be impeached in an action against the sheriff. The court say, "if the return of the sheriff be false, or there be any neglect of duty by the under sheriff or bailiff, the sheriff is alone responsible to the party injured. As between conflicting execution creditors it cannot be gainsaid, the injured party having an adequate remedy against him. This principle, if it needs the aid of authority, was ruled in *Diller v. Roberts*, 13 S. & R. 64, and *Blythe v. Richards*, 10 Id. 266. The parol evidence was given to contradict the sheriff's return and for that purpose was clearly inadmissible, and must be altogether disregarded. It is a singular feature in this case that the sheriff and his deputy were examined to the truth of the return; and this of itself shows the wisdom of the rule as heretofore established. If they could be examined for, they may be examined against the return; and in this manner escapes from the consequences of official misconduct. In an action against the sheriff, the truth of the return may be inquired into; and for that purpose parol evidence will be competent.

Before return made by the sheriff, the courts have always interposed to prevent injustice, but they cannot alter the effect of a return; although in a proper case they may enlarge the time for making it, or may grant leave to amend it. The court is always anxious to protect the officer in the discharge of his duty; but at the same time we must be careful not to screen him from the necessary responsibility to suitors. It is difficult to calculate the mischief which may arise from relaxing those wholesome restrictions on the exercise of executive authority. Nor must we, for one moment, give countenance to the practice of introducing parol testimony to control the sheriff's return, except in an action against him for official misconduct." To the same effect as to the conclusiveness of a sheriff's return as between the parties, are *Zion Church v. St. Peter's Church*, 5 W. & S. 216; *M'Clelland v. Singluff*, 7 Id. 184, *Sample v. Coulson*, 9 Id. 62, and he may add *Shoemaker v. Ballard*, 8 Harris 92.

The syllabus of the case last cited is this: "though parol evidence is not admissible to contradict or vary a sheriff's return to a writ, yet, where ambiguity exists in it, parol proof of facts

consistent with and not appearing on the face of the return, may be heard in explanation, and to show the truth of the case." This is the extent to which the court has gone in admitting parol evidence in relation to sheriffs' returns.

But in this case the attempt is not to explain an ambiguity in the sheriff's return, by parol proof of facts not inconsistent therewith, but to contradict the return itself. This cannot be permitted without a total disregard of all law, and virtually overturning the decisions of the Supreme Court. If this court had the power, we see no reason to change the law in relation to the conclusiveness of a sheriff's return and the inadmissibility of parol evidence to contradict or control it, as between the parties to the action. The rule, as established, is a safe and practical one, wholesome in its provisions, and ought to be adhered to.

We have quoted more largely from the authorities bearing upon this question than we otherwise should, had we not, on the argument of this motion, been referred to some one or more cases, in which it was said that this court had received parol evidence to contradict the sheriff's return, and upon the strength thereof had set aside the returns in the cases referred to. A practice so repugnant to the well-settled rule of law cannot be tolerated.

Rule discharged.

Welsh v. Bell, 8 Casey 12; Zion Church v. St. Peter's Church, 5 W. & S 217; Kennard v. Railroad, 1 Phil. 41; Patton v. Insurance Co., 1 Id. 396; Snyder v. Carfrey, 4 P. F. Smith 90.

*In the District Court of Allegheny County.*

MAGILL, FOR USE, v. HIGGINS ET AL.

(Vol. VII., p. 259. 1860.)

1. The plaintiff in an action on a replevin bond, where there was judgment of nonsuit in the action of replevin, may either issue a *scire facias quare executionem non* or a *sci. fa.* suggesting breaches: *Curtis v. Kearney*, 2 Pittsb. 87.
2. But he is not at liberty to suggest breaches and forthwith issue an exe-

cution for the penalty of the judgment, to be released on payment of the value of the property replevied, with interest and costs.

3. The defendants are entitled to a day in court, and besides, the sureties are not concluded by the value fixed on the property in the replevin.

No. 42, July Term, 1857, *fi. fa.* Rule to show cause, etc.

*G. P. Hamilton*, for the rule.

*Barton*, contra.

PER CURIAM.—This is a rule to show cause why the execution issued in this case should not be set aside at the cost of the plaintiff.

The judgment was entered on a replevin bond with warrant of attorney annexed, given by the defendants to the sheriff, to indemnify him for executing a writ of replevin in No. 575, July T. 1855, at the suit of James Higgins against Dalzell, M'Farland & Co. The writ of replevin was executed by serving a copy on the defendants, and delivering the property therein described to Higgins's attorney. The action of replevin was set down for trial, and when reached, the plaintiff was called and judgment of nonsuit was entered against him. Thereupon the defendant Dalzell took an assignment of the judgment entered on the replevin bond, and having suggested as a breach the failure to prosecute the action of replevin, and the judgment of nonsuit therein, directed an execution to be forthwith issued for the penalty, to be released on payment of the value of the property replevied, with interest from the date of the bond, costs of suit of the action of replevin and costs in this case. Two of the defendants, sureties of Higgins in the bond, have applied to have the execution set aside, on the ground that it was improperly issued. Upon the judgment of nonsuit in the action of replevin, the plaintiff in this case might either have issued a *scire facias quare executionem non* or a *scire facias* suggesting breaches, as ruled by this court in the case of Curtis, for use, *v. Kearney*, No. 568, April Term, 1854: *supra*, 87. The opinion filed in that case is referred to, as containing the reasons and the authority in support of this position. But the plaintiff was not at liberty to suggest

breaches and issue an execution for the penalty of the judgment, to be released on payment of the value of the property replevied with interest and costs. The defendants were entitled to a day in court, and besides, the sureties are not concluded by the value fixed on the property by the plaintiff in the replevin. We are therefore of opinion that the execution was improvidently issued, and that it must be set aside at plaintiff's costs.

Rule absolute.

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*In the District Court of Allegheny County.*

SHRIVER & DILWORTH v. HARBAUGH & MAGILL.

(Vol. VII., p. 265. 1860.)

1. Where a garnishee in foreign attachment, after service of the writ upon him, points out to the officer the property claimed, informing him that it is in dispute, and requests him to take it into actual possession, it being capable of seizure, and the officer informs him that, the plaintiff having refused to indemnify him, he does not attach the goods and has no claim whatever upon them, the goods are not bound by the writ, and the garnishee is not liable to the plaintiff therefor.
2. The plaintiff's remedy for any damage sustained is against the officer.

At No. 761, November Term, 1858.

*Burgwin*, for plaintiffs.

*Hamilton* and *Acheson*, for defendants.

The opinion of the court on the reserved question, was delivered, February 11, 1860, by

HAMPTON, P. J.—This case comes before us on a question of law reserved at the trial for the determination of the court in banc.

The facts out of which the question arises are as follows: The present plaintiffs sued out a writ of foreign attachment to No. 571, November Term, 1855, against one William Porter, a non resident, and summoned Springer Harbaugh and William Magill as garnishees. A judgment was obtained against Porter, on the

12th of January, 1857, for \$648 49. Subsequently this *scire facias* was issued and served on these defendants as garnishees, to which they put in severally the plea of *nulla bond*, and the two cases were tried together.

The property in question consisted of ten sacks of wool, which were in the possession of Harbaugh as bailee of Magill, the other defendant, who, while sheriff of this county, had seized the same with other wool, under another foreign attachment in favor of Robinson & Co., of Philadelphia, as the property of William Porter, then in possession of the O. & P. R. R. Co., and placed it in the custody of Harbaugh for safe keeping. On the 9th of October, 1855, the plaintiffs in this case sued out a writ of foreign attachment against William Porter, which was placed in the hands of Sheriff Patterson, who had in the meantime come into office, on the 26th of the same month. The writ is in the usual form, directing the sheriff to attach the said Porter by all and singular his goods and chattels, lands and tenements, in whose hands or possession soever the same might be; and directing him to summon William Magill and Springer Harbaugh, and all other persons in whose hands or possession the said goods and chattels, lands or tenements, or any of them may be attached.

To this writ the sheriff made the following return, viz:

"Executed this writ by serving a copy on Springer Harbaugh, and by summoning him as garnishee. Also by copy on William Magill, and by summoning him as garnishee, October 29, 1855."

On the trial of the cause the plaintiffs only claimed the value of ten sacks of wool, which were all the property, goods or effects alleged to be in the defendant's possession belonging to William Porter, and his title to this wool was strongly contested by the defendants. That question however does not arise here. The defendants produced as a witness, Edward Campbell, jr., who testified under exception, as follows, viz:

"I was deputy sheriff in November, 1855, when the writ of attachment in this case was put into my hands. I sent another deputy of the sheriff to serve the writ. He reported that he had served the writ; I learned either from the deputy or Harbaugh, am not certain which, that the wool in question was claimed by H. Robinson & Co. I then gave notice to Mr. Selden, the at-

torney for the plaintiffs, that I would not make actual seizure of the wool without indemnity from the plaintiffs. Mr. Selden declined to indemnify the sheriff, alleging that the service of the writ already made was sufficient to hold the wool without actual seizure. I, of course, then refused to take actual possession of the wool, and so informed Harbaugh. Harbaugh repeatedly afterwards requested me to take actual possession of the wool, if I intended to hold it, and release him from the possession of it. I refused to do so, repeatedly, without indemnity from the plaintiffs, which was refused."

The witness then identified a letter written by him to Harbaugh, after frequent importunity by the latter, that he would give him something in writing. The letter is as follows, viz:

"Shriver & Dilworth	}	No. 571, November Term, 1855.
v.		Foreign attachment.
William Porter.		Springer Harbaugh, garnishee.

"S. HARBAUGH—*Dear Sir*—Mr. Selden, the attorney for the plaintiffs in the above case, has been informed that you have in your possession no property of William Porter, and that the wool supposed to belong to said Porter is claimed by H. Robinson & Co., and he refuses to indemnify the sheriff, or to show us any property in your possession to be attached under said writ.

"The sheriff has therefore no claim upon the said wool, or any other goods in your possession, and claims to hold none by virtue of said attachment.

"EDWARD CAMPBELL, JR.,  
"for RODY PATTERSON.

"December 27, 1855."

On the trial of the cause the defendant's counsel asked the court to instruct the jury. "That the mere service by the sheriff of a copy of the writ of foreign attachment on the defendants, on the 29th October, 1855, did not bind the wool in question, and the verdict must be for the defendants; because the uncontradicted evidence shows, that said wool was susceptible of seizure or manual occupation by the sheriff, who being informed that the same was claimed by Robinson & Company, called on plaintiffs for indemnity before executing said writ as to said wool,

which indemnity the plaintiffs declined to give; whereupon the sheriff refused to execute said writ, as to said wool, and notified the defendant, Harbaugh, of such, his refusal, and that he had no claim on said wool."

The court reserved this question, and instructed the jury, *pro forma*, that the evidence referred to in the defendant's point, taking it all to be true, did not constitute a valid defence to this action. The jury found a verdict for the plaintiffs, subject to the opinion of the court in *banc* on the question reserved.

The question raised by this record is one of importance, as affecting the rights of garnishees, as well as the safety of the sheriff and the interests of creditors. We shall consider this question as if all that Mr. Campbell testified to had taken place, at, and immediately subsequent to, the time of the service. For certainly it can make no difference in principle; because if the sheriff was bound to seize the goods at the time the writ was served, he continued to be so bound as long as they were capable of manual occupation, and the writ remained in his hands. The writ was evidently still in his hands when he went to Mr. Selden and demanded indemnity; and the goods remained in the hands of Harbaugh capable of seizure, because he requested the deputy repeatedly to take possession of them, and besides, according to the provisions of the Act of Assembly, the sheriff is first to go to the person in whose hands the goods are supposed to be, and declare in the presence of one or more persons, that he attaches the goods, which goods after such service, shall be bound by such writ, and be in the officer's power, and if capable of seizure, he shall secure the same. But this possession is not to be taken until after the service of the attachment, showing very clearly that the officer may take the goods into his custody at any time after the service, while the writ remains in his hands.

The question then to be determined is, whether, the garnishee would be liable in this action, if, when the deputy came to serve the writ upon him, he had pointed out to him the property claimed, informing him it was in dispute, and requested him to take it into actual possession so as to relieve him from all responsibility—and the officer informed him that he had demanded security from the plaintiffs, who had refused to give it, and there-

fore he did not attach the goods, and had no claim whatever on them, and the officer then handed him a copy of the writ, and made his return as was done in this case.

The remedy by foreign attachment is a proceeding *in rem*, and not *in personam*, for the purpose of procuring the appearance of a debtor who resides out of the state. The sheriff is commanded to attach the defendant by all and singular, his goods and chattels, lands and tenements, so that he be and appear, &c., that is, he is commanded to seize and take possession of all the goods and chattels of the defendant, wherever he can find them, and hold them as pledges that the defendant will appear and answer, or in default thereof that they shall be forthcoming to satisfy the plaintiff's claim. The legal meaning of the words, "to attach," is to seize and take into custody. In criminal law an attachment is a writ requiring the sheriff to apprehend a particular person, who has been guilty of a contempt of court, and bring him before the court; and in civil practice, says Bouvier (Law D. tit. Attachment), it is a writ issued by a court of competent jurisdiction, commanding the sheriff or other proper officer, to seize any property, credit or right belonging to the defendant, in whatsoever hands the same may be found, to satisfy the demand which the plaintiff has against him.

The 48th section of the Act of 16th June, 1836, provides, that "in case of personal property the attachment shall be executed as follows, to wit: The officer to whom such writ shall be directed, shall go to the person, in whose hands or possession the defendant's goods or effects are supposed to be, and then and there declare, in the presence of one or more credible persons of the neighborhood, that he attaches the said goods or effects;" and the 50th section provides, that "the goods and effects of the defendant in the attachment, in the hands of the garnishee, shall, after such service, be bound by such writ, and be in the officer's power, and if susceptible of seizure or manual occupation, the officer shall proceed to secure the same, to answer and abide the judgment of the court in that case, unless the person having the possession thereof will give security therefor."

The provisions of this act are in affirmance of the law as it stood before, and are couched in terms so plain that he who runs



may read. The duty of the sheriff to take the property attached into his actual possession, if susceptible of seizure, is imperative, unless the defendant chooses to give security therefor: *Morgan v. Watmough*, 5 Whart. 125. And in this respect it is similar to the proceeding in replevin. In either case the defendant may retain the possession by giving security for its delivery in case of a recovery by the plaintiff. But in neither case does he obey the exigency of his writ by merely serving a copy on the defendant or garnishee. The meaning of the legislature in regard to the duty of the sheriff is too clear to admit of doubt or hesitation.

But it is said this provision was enacted for the benefit of the plaintiff, in order that the property might be secured to answer his demand. This is very true so far as the rights of the defendant in the writ are concerned. Because by entering an appearance he can have the attachment dissolved, and his property released. But how is it with the garnishee? Has he no rights to be guarded, no interests to be protected? Must he be subjected to expense and annoyance when he is in no default? He has done all the law required him to do by offering to deliver up the property to the sheriff. He had no means of dissolving the attachment, and if the doctrine now contended for be correct, he can make no disposition of the property, but is bound to take care of it, and run the risk of its destruction by fire, or flood, or any other casualty, for an indefinite period of time. In other words, he is compelled to do what the plaintiffs were unwilling to do by indemnifying the sheriff.

But if the law be not as we have supposed, in case of a refusal by the sheriff on request to take possession of the property, still there is another fact in this case which is fatal to the plaintiff's right to recover. On the 27th of December, 1855, about two months after the service of the writ, the sheriff notified the garnishee in writing, that he "had no claim upon this wool or any other goods in his possession, and claimed to hold none by virtue of said attachment." And in consequence of said notice, a few days afterwards, viz. the 31st of December, the wool was given up to Robinson & Co. of Philadelphia.

Now this is a *scire facias sur* garnishment, which implies that the garnishee has been warned or notified by the sheriff that he

has attached all the property, goods and effects of the defendant, in his possession, and that the garnishee will be required to appear and surrender up the goods to answer the plaintiff's demand, or pay their full value in default thereof. In *Bingham v. Lamping*, 2 Casey 840, Mr. Justice Lowrie says, "the utmost effect that can be given to such a service is, to treat it as a notice to the garnishee to retain, in order to answer the purposes of the attachment, any goods of the defendant that may be in or may come into his hands. The duty imposed upon him by this notice was, that he should not allow any goods which he knew, or which the law charged him with the duty of knowing, to be the property of the defendant, to pass out of his hands."

Now if the utmost effect that could be given to this service was to treat it as a notice to the garnishee to retain the goods of Porter in his hands, that effect was entirely destroyed by a written notice from the same officer, that he had attached no goods in his hands, and claimed to hold none by virtue of such service. This of itself would be a sufficient answer to the present action, and if the plaintiffs sustained any damage, their remedy would be against the sheriff.

For these reasons we are of opinion that the law is with the defendants on the question reserved.

The prothonotary is directed to enter judgment for the defendants on the question reserved, *non obstante veredicto*.

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*In the Circuit Court of the United States for the Western District of Pennsylvania. In Equity.*

GRACE LONERGAN v. JAMES FENLON.

(Vol. VII., p. 266. 1860.)

1. When the answer to a bill in equity is fully responsive, the answer will prevail, unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness, and other attendant circumstances which supply the want of another witness.
2. Contemplation of insolvency is not a "contemplation of bankruptcy" within the meaning of the Act of Congress of 1841.
3. A judgment creditor must have notice of a prior act of bankruptcy, or of

the intention of the bankrupt to take the benefit of the act, before his judgment can be assailed.

4. The validity of the judgment cannot be called in question in a collateral proceeding.
5. After the lapse of sixteen years from the date of the judicial sale under the judgment, a chancellor will not decree that it shall be set aside, at the instance of the vendee of the assignee in bankruptcy.

*C. W. Robb and Shaler*, for the complainant.    *Geo. P. Hamilton*, for the respondent.

Opinion of the court, delivered Feb. 22, 1860, by

MCCANDLESS, Dist. J.—This case comes before us, upon bill, answer and testimony. The bill charges substantially, that Kennedy Lonergan was the owner of thirty lots of ground in the seventh ward of the city of Pittsburgh, purchased from Mrs. Sarah B. Fetterman, the whole consideration money of which was not fully paid. That being an extensive railroad contractor he became largely involved, owing to the inability of the Hiawatha Tennessee Railroad Company and the Little Miami Railroad Company to meet their liabilities to him. That on the 24th of March, 1842, he executed a judgment bond to John M'Divitt for \$3000, and another to the respondent for \$5000, and that these were executed in contemplation of bankruptcy. That Fenlon advised him to take the benefit of the bankrupt law, and that to the prejudice of the general creditors. Fenlon, on 10th July, 1842, caused these bonds to be entered up to operate as liens upon the real estate so purchased. That the judgment to Fenlon was without consideration, and in fraud of the rights of creditors. That he caused these lots to be sold by the sheriff, and purchased the same for \$2010, when they cost Lonergan \$7250, and are now worth \$20,000. That on the 20th of December, 1842, upwards of five months after the judicial sale, Lonergan filed his application in the District Court of the United States for the District of Ohio, and was declared a bankrupt, and on the 4th day of February, 1843, he was discharged, and received his certificate as a bankrupt. On the 16th of December, 1852, nearly ten years afterwards, the assignee in bankruptcy, at public sale, and under an order of the proper

court, sold these lots to the complainant for the sum of seventy-two dollars. The sale was approved, and a deed made to the vendee, the widow of Kennedy Lonergan. The bill does not charge, but it appears in the evidence, that Lonergan died in 1851. The complainant alleges that she is the owner of the lots in question, that she has no adequate remedy at law, prays the court to decree the same to her, and that the respondent may be perpetually enjoined from disposing of the same.

To every material part of this bill the answer is fully responsive; and in such case the rule in equity is, "that unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness, and other attending circumstances which supply the want of another witness, and thus destroy the statement of the answer, or demonstrate its incredibility, or insufficiency as evidence, the answer must prevail:" 9 Cranch 358; 8 Greenleaf 296.

Guided by this rule, let us examine the complainant's proofs.

It is contended that the judgment to Fenlon was without consideration—and that he was *particeps criminis* in procuring its confession, to the prejudice of the general creditors of the bankrupt estate. The exhibits attached to the answer show that he was a meritorious creditor, and from the testimony of M'Divitt, it is clear that in everything connected with the execution of the bond, and its entry as a lien, Fenlon was comparatively passive. It was held by M'Divitt for nearly four months, and then only entered upon advice from Lonergan that he could not get through with his difficulties.

The second branch of this point made by complainant's counsel brings up the main question in this case.

Was the judgment to Fenlon confessed in contemplation of bankruptcy, and at that date, had Fenlon notice of the intention of the bankrupt to take the benefit of the act? This is dependent principally upon what occurred at the execution of the bond, and to understand it properly we must eviscerate the testimony of M'Divitt.

He says: "The bonds were given to protect us against loss, in the event of his becoming insolvent and not being able to get through with his difficulties."

When further interrogated, Mr. M'Divitt says: "Mr. Lonergan may have expressed fears that he would have to do it (take the benefit of the bankrupt law) as he was a good deal frightened about the condition of his business then."

All this took place at Cincinnati, where the witness was called by a letter from Lonergan to Fenlon, and in the contents of which both were equally interested.

Now what is the construction adopted by the Supreme Court of the United States, as to the expression, in the act, "contemplation of bankruptcy."

They say, in 13 Howard 168, that the word bankruptcy occurs many times in the act. It is entitled "An Act to establish a uniform system of bankruptcy." And the word is manifestly used in other parts of the law to describe the legal *status* to be ascertained and declared by a judicial decree. It cannot be easily admitted that this very precise and definite term is used, in this clause, to signify something quite different. It is certainly true, in point of fact, that even a merchant may contemplate insolvency and the breaking up of his business, and yet not contemplate bankruptcy. He may confidently believe that his personal character, the state of his affairs and the disposition of his creditors, are such that, when they have examined into his condition, they will extend the times of payment of their debts, and enable him to resume his business. A person not a merchant or banker, and consequently not liable to be proceeded against and made a bankrupt, though insolvent, may have come to a determination that he will not petition. The contemplation of one of these states not being in fact the contemplation of the other, to say that both were included in a term which describes only one of them, would be a departure from sound principles of interpretation. The object of the provisos was to protect *bona fide* dealings with the bankrupt more than two months before the filing of the petition by or against him, provided the other party was ignorant of such an intent on the part of the bankrupt as made the security invalid under the first enacting clause. And the language is, "provided that the other party to any such dealings or transactions had no notice of a prior act of bank-

ruptcy or of the intention of the bankrupt to take the benefit of this act."

These facts, of one of which a *bond fide* creditor must have notice, to render his security void, if taken more than two months before the filing of the petition, can hardly be supposed to be different from the facts which must exist to render the security void under the first clause; or, in other words, if it be enough for the debtor to contemplate a state of insolvency, it could hardly be required that the creditor should have notice of an act of bankruptcy or an intention to take the benefit of the act.

It would seem that notice to the creditor of what is sufficient to avoid the security, must deprive him of its benefits, and consequently, if he must have notice of something more than insolvency, something more than insolvency is required to render the security invalid; and that we may safely take this description of the facts, which a creditor must have notice of to avoid the security, as descriptive also of what the bankrupt must contemplate to render it void.

At what time, then, had Lonergan contemplated an act of bankruptcy, or a decree adjudging him a bankrupt upon his own petition? He gave the bond on the 24th of March, 1842. He continued his business during part of the summer of that year. Not until July did he write to M'Divitt to enter up the judgments, and in December following he filed his application for the benefit of the Bankrupt Law.

During the nine months intervening between the execution of the bond and the filing of his petition, he may have been harassed, embarrassed and insolvent; but it does not follow that he contemplated an act of bankruptcy.

What Cady relates as happening on St. Patrick's day, 1842, and the matters detailed by Thomas A. Lonergan, do not militate against this view of the case, although the latter witness was disingenuous enough to suppress his relationship to the parties, and the fact that he was but nine or ten years of age when the principal circumstances to which he testified occurred.

The testimony does not support the allegation of the bill, that the bond to Fenlon was given in contemplation of bankruptcy, and if it did, it fails to show that Fenlon had notice of it. He

is, therefore, clearly within the first and second provisos to the second section of the Bankrupt Law.

Entertaining these views, it is unnecessary to reconcile the conflicting opinions as to the exclusive jurisdiction of the Bankrupt Court, in a proceeding to ascertain the validity of this judgment.

We hold that it cannot be assailed in a collateral action, and that this court is not the forum in which to test it. It remained undisturbed during more than seven years of the life of the bankrupt, and now, with the proofs before us, no chancellor would decree that a judicial sale, occurring under it sixteen years ago, should be set aside at the instance of the vendee of the assignee in bankruptcy.

Upon the whole case, we are of opinion, that the complainant is not entitled to the relief prayed for, and the bill is dismissed at the costs of complainant.

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*In the Circuit Court of the United States for the Western District of Pennsylvania.*

DOBBIN v. THE COUNTY OF ALLEGHENY.

(Vol. VII., p. 282. 1860.)

1. The issue of a special *f. fa.* under the Act of 1834, and which has been executed and returned by the marshal, does not conclude the plaintiff, but he may resort to his common law writ of *f. fa.*, to obtain satisfaction of his judgment.
2. He may have several writs in succession; or suing out one, he may abandon it before it is executed, and sue out another; or he may even have several writs running at the same time, provided they all be of the same species.
3. The taking out of the writ is not an election, but only in order to an election.
4. An attachment execution, under the Act of 1836, is in substance, if not in form, an execution, and such writ may issue pending a *f. fa.*
5. The remedies of a plaintiff are cumulative and successive, and the pursuit of one remedy will not deprive him of another.

6. The courts of the United States may, in their discretion, adopt any part, or all of the remedies provided by the legislature of a state.
7. This delegation of power by Congress, held to be constitutional, by the Supreme Court of the United States.
8. The adoption of the Act of Assembly of Pennsylvania, of 1834, as part only of the final process of the United States Circuit Court, to enforce judgments against counties, held to be within the limits of their legitimate and constitutional powers.

THIS was a motion to set aside a *fi. fa.*, by virtue of which the U. S. Marshal had levied on 14,000 shares of stock in the Allegheny Valley Railroad Company, and 15,000 shares in the Connellsville Railroad Company, owned by the defendant.

Judge *Shaler*, for the plaintiff; Mr. *Geyer* and Mr. *Williams*, for the defendant.

Opinion of the court, delivered March 13th, 1860, by

MCCANDLESS, J., sitting at Circuit.—This case was tried by jury at the last term. A verdict was rendered for plaintiff, on the 28th of November, for the sum of \$7525 50, and a judgment entered on the 6th day of December, 1859. On the 19th of the same month plaintiff's counsel issued a special *fi. fa.* under the Act of 1834, returnable to the first Monday of February. On the 4th of February the marshal made his return to this writ, and it not appearing, either by it or *aliunde*, that at the date of the service there were "any unappropriated moneys in the treasury of the county," nor that "any moneys have since been received for the use of said county," the extraordinary power of this court could not be invoked "to enforce obedience to such writ of attachment." A power, it should be remembered, which, in this jurisdiction, is not satisfied by a fine, but by imprisonment until the contempt is purged, and from the penalties of which the constitutional clemency of the President of the United States cannot relieve the offending party. This writ, proving fruitless, the plaintiff resorts to his common law remedy, and issues an ordinary *fi. fa.*, upon which the marshal seizes the stock held by the county in the Allegheny Valley and Connellsville Railroads, amounting to upwards of a million dollars. A motion is now made to set this execution aside, upon the ground that the plain-



tiff having issued his writ under the Act of 1834, has made his election, and is concluded, and that this court, in adopting that act as a part of its final process, had no authority to grant an optional remedy. These points will be considered and decided in their order, and to arrive at an accurate conclusion upon a question which involves the destination of so large an amount of public property as is levied on in this case, we have examined all the authorities bearing upon the topic within our reach.

1. As to the first point submitted. It will be observed that the special *fi. fa* has performed its office; it has been executed and returned. Two different species of execution cannot be executed at once on the same judgment, nor a second writ of the same, or of a species different from its forerunner, till that has, by return, been proved insufficient: 8 Modern 302, Bing. on Ex. 175. The party for whom judgment was given, may have a writ of *feri facias*, or *elegit*, or *levari facias*, or *capias ad satisfaciendum*, at his option; or he may have all in succession until his judgment is satisfied; or suing out one, he may abandon it before it is executed, and sue out another; or he may even have several writs running at the same time, provided they all be of the same species: Archbold's Prac. 254; Tidd 901; 2 Paine & Duer. 290; 8 Johns. Rep. 388. So with respect to *elegit*, if the land be extended upon an *elegit*, the plaintiff is forever barred from having another execution; but if he levies on the goods only, and the sheriff returns *nihil* as to the lands, a *ca. sa.* may issue for the residue, or a *feri facias*; for the election is not complete unless the plaintiff had some benefit from the land; for the taking out of the writ is not an actual election, but only in order to an election: 1 Sellons' Prac. 536; Strange 226; Tidd 1022. An attachment execution under the 35th section of the Act of 1836 is process to enforce the judgment; and it is in substance, if not in form, an execution. It differs from a *feri facias* essentially only in this, that it reaches effects, from which the debt could not otherwise be levied: Wray v. Tammany, 1 Harris 394. And yet the Supreme Court of Pennsylvania have decided that the plaintiff may issue an execution attachment pending a *fi. fa.*: Tams v. Wardle, 5 W. & S. 222. It is an execution so far collateral to the judgment that it may proceed simulta-

neously with the ordinary executions : *Newlin v. Scott*, 2 Casey 108. The plaintiff can have only one satisfaction, but is entitled to all process necessary to obtain that. In this connection I am happy to have found a decision of the Supreme Court of the United States, delivered by Mr. Justice Baldwin, a great and good judge, than whom no one was more profoundly learned in the doctrines of the common law. It bears directly on this point. In *Tayloe v. Thompson*, 5 Peters 369, he says, "the plaintiff had an undoubted right to an execution against the person, and the personal or real property of the defendant; he has his election; but the adoption of any one does not preclude him from resorting to the other, if he does not obtain satisfaction of the debt on the first execution. His remedies are cumulative and successive, which he may pursue until he reaches that point at which the law declares his debt satisfied. We know of no rule of law which deprives a plaintiff in a judgment of one remedy by the pursuit of another, or of all which the law gives him." It follows, then, both from reason and authority, that the first writ did not exhaust the remedy of the plaintiff in this case, but that he may issue subsequent and successive writs until he obtains satisfaction of his judgment.

2. Upon the second point submitted, it was contended, with great earnestness, by the learned counsel for the defendant, that this court has exceeded its authority in adopting the Act of 1834, with a provision rendering it optional with the party to pursue it or not at his pleasure—that we were bound to constitute it, as the exclusive final process, to enforce judgment against a county. But such is not the law. It is well settled in 10 Wheat. 1 and 51, and in 9 Peters 329, by the Supreme Court of the United States, that this court may accept and adopt any part or all of the remedies provided by the legislature of the state at our discretion. It was there held, that this delegation of power by Congress, was perfectly constitutional, that the power to alter or add to the proceedings in a suit, embraced the whole progress of such suit, and every transaction in it, from its commencement to its termination, and until the judgment should be satisfied; and that it even authorized the courts to regulate the conduct of the officer in the execution of final process in giving effect to its judgment. And it

was there emphatically laid down, that a general superintendence over this subject, was properly within the judicial province, and has always been so considered. That this provision enables the courts of the Union to make such improvements in their forms and modes of proceeding, as experience may suggest. It was intended to adopt and conform to the state process and proceedings, as the general rule, but under such guards and checks as might be necessary to insure the due exercise of the powers of the courts of the United States. In adopting, therefore, this Act of 1834, as part only of the final process of this court in proceedings against counties we acted within the limits of our legitimate and constitutional powers.

We entertain no doubt of the regularity of this execution. The rule is discharged, and unless this judgment is paid, the marshal must proceed with the sale. Rule discharged.

Davies v. Scott, 2 Miles 52; Grant v. Potts, Id. 164; Tama v. Wardle, 5 W. & S. 222; Pontius v. Nesbit, 4 Wright 309. For a form of the writ provided by the Act of 1834, see Hewson v. The Northern Liberties, 1 P. L. J. 322.

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*In the Common Pleas of Butler County.*

REBSTOCK v. REBSTOCK.

(Vol. VII., p. 337. 1860.)

A decree of divorce by a court of another state, on petition filed by a resident of this state, against whom proceedings for divorce had been previously instituted in Pennsylvania, will not bar a decree in the action here.

At No. 48 of September Term, 1858. Libel for a divorce, *a vinculo matrimonii*.

*Hipple*, for plaintiff.

*Purviance & Son*, for the defendant.

The case is fully stated in the opinion of the court, filed April, 1860, by

AGNEW, P. J.—After a trial and verdict in favor of the complainant, this case is now before us, upon a plea in bar of a decree; on the ground that pending this proceeding the respondent has been divorced by a decree in the state of Indiana. The replication of the complainant denies in substance, the jurisdiction of the court there, and asserts that the divorce was obtained in fraud of the law of that state, of his rights, and of the jurisdiction of this court, and on all these grounds alleges it to be void, and no bar to a decree.

The depositions taken to establish the facts set forth in the replication, show clearly, that the respondent was born and lived all her lifetime in Butler county, and only left this state after the proceedings in this case had been instituted. That she left in the latter part of August, 1858, for the purpose, as repeatedly stated by her before leaving, of going to Indiana to obtain the divorce, and of returning to Butler; expressing the belief that she would be welcomed back among her girlish associates, and received into favor as one who was unmarried. That she went to Huntington county, Indiana, and remained there a few weeks only, to initiate proceedings; went thence into Ohio, and remained through the winter with friends, and returned to Indiana about the first of March, and remained there at an hotel until the 30th of March, when the decree was made, and the next day started home to Butler in company with her father, who had been carrying on the proceedings for her, and bore the expenses, including those of her support.

The petition of Adolphus J. Rebstock to this Court was filed on the 14th day of August, 1858, and the respondent's answer on the 17th day of September following, submitting herself to its jurisdiction by denying the merits of the application, and claiming a trial by jury, averring no want of citizenship, or change of domicil, in herself, and no want of jurisdiction in the court. The cause came on for trial before a jury on the 29th of March, 1859, defended by her counsel, and a verdict was rendered for the complainant on the 30th day of March. This plea in bar in the nature of a plea *puis darrien continuance*, was not put in, until the 2d day of April following, as soon, however, as the respondent reached home from her Indiana excursion.

By the exemplification produced, it appears that the respondent's application to Huntington Circuit Court, in Indiana, was made to February Term, 1859, but on what day it was filed and proceedings began there, nowhere appears in the record. The record sets forth the husband as a non-resident of Indiana, and publication is, therefore, ordered by the court, which appears to have been made by three successive insertions in a newspaper there, immediately previous to the 11th of November, 1858. In her petition the applicant sets forth that she is a *bond fide* resident of Huntington county, and charges her husband with abandonment, cruel treatment, and failure to make provision for her, as the grounds of divorce. The decree was made *ex parte*, on the 30th day of March, 1859, on the same day the case was on trial, and a verdict rendered for the complainant in the case before us.

Upon these facts the question arises, is the Indiana divorce a bar to one here? A negative reply must be returned on three grounds:

1. The Indiana court had no jurisdiction of the person of the husband on general principles.

2. That jurisdiction, if it might have been taken, was ousted by the prior jurisdiction taken here.

3. The conduct of the applicant there was in fraud of the law of Indiana, as well as that of Pennsylvania.

It is not doubted that the judicial proceedings of the courts of other states have the same effect here, as if they were judgments of our own courts. So it is settled by the decisions of both the federal and state judiciaries, under the 1st sect. 4th art. of the Constitution of the United States, and the Act of Congress made in pursuance: *Mills v. Durzee*, 7 Cranch 481; *Hampton v. McConnell*, 3 Wheat. 204; *McElmayle v. Cohen*, 13 Peters 544; *Benton v. Burgott*, 10 S. & R. 240; *Baxley v. Linah*, 4 Harris 241; *Rogers v. Burns*, 3 Casey 527: when, therefore, the person of a party has been brought within the jurisdiction of the court of any state, and he has had notice of the proceeding, he will not be permitted to litigate the same matter before a new forum in another state. But the Constitution of the United States was not intended to contravene the plain principles of

natural justice, and by the operation of a fundamental provision, irrepealable by Congress or the states, conclude one who has never been legally brought within the power of the state in whose forum he has been condemned. This would be to place the states not merely upon an equal footing with each other, in respect to the matters rightfully adjudicated therein, the true purpose of the constitution, but would do more, and would bring the citizens of our state within the arbitrary control of another, and thus enable the latter to usurp an authority not only over the citizens, but over the domestic institutions of the former. Natural justice forbids that any one shall be subjected to a decision anywhere who is not within the power of the court to be called before it, or who is without notice, and unheard. Hence it has been held in this state, that the judgment of a court in another state is inoperative and void, as against a citizen of this who was not amenable to its jurisdiction, and has not voluntarily submitted himself to it. In *Benton v. Burgott*, 10 S. & R. 240, Judge Duncan expressly qualifies the decision in this respect—"provided the defendant was notified and the court had jurisdiction." *Steel v. Smith*, 7 W. & S. 447, directly rules that the Act of Congress, made to carry out the section of the Federal Constitution referred to, does not preclude an inquiry into the jurisdiction of the court, or of the right of the state to confer it. This was reaffirmed in *Campbell v. Steele*, 1 Jones 394, and in *Rogers v. Burns*, 3 Casey 527. In the last case, Lewis, C. J., says: "Where the state has no authority over the person of the defendant, the judgment rendered by its judicial tribunals, although conformable to its legislative enactments, can have no extra-territorial operation." These authorities are sustained by the decisions of the Supreme Court of the United States, in which the right of final exposition rests: *De Arsy v. Ketchum et al.*, 11 Howard 165. Story, in his *Conflict of Laws*, § 609, and Greenleaf, in his *Evidence*, vol. 1, § 548, hold the same doctrine.

The husband in this case having been before, at the time of his marriage, and ever since, domiciled in this state, and never having set his foot on the soil of Indiana, or submitted himself to her jurisdiction, on the general principle of the right of legal cognisance was not amenable to the power of her courts. In respect

to the particular subject of divorce, which affects not merely a purely civil contract, but a domestic relation of the state where the parties are domiciled, the authorities place the husband still further beyond the reach of extra-territorial jurisdiction. It is indeed upon the fact of this relation, which concerns the internal polity, social order and morals of the state, that the power of the legislature to declare a marriage null rests; as otherwise in the light of a mere civil contract, concerning the parties to it alone, its abrogation, without mutual consent, would be within the prohibition of both federal and state constitutions against the impairing of contracts.

Marriage, therefore, confers not only individual rights, but is looked upon as a civil status, and is recognised as within the *jus gentium*. This it is which led to the high controversy so long agitating the English and Scottish Courts on the subject of divorce; the former insisting upon the inviolability of an English marriage, and the latter asserting their authority to declare it void, even where the parties were found within their jurisdiction for temporary purposes, and for causes arising in England. We are saved the labor of discussing the merits of this dispute by our own case of *Dorsey v. Dorsey*, 7 Watts 849, where the late C. J. Gibson, in a characteristic opinion, tossing aside the extreme pretensions of each, grasps the principles at the foundation of the controversy, and laying them bare, shows that they are inconsistent with the doctrines of American government, and the relations of the sister states. He concludes with the declaration "that the law of the domicil, at the time and place of the injury, is the rule for everything but the original obligation of the marriage." It was, therefore, decided that though the original domicile and marriage had been in Pennsylvania, yet her courts have no jurisdiction of a cause of divorce against the husband, arising whilst he was domiciled in another state. This case in its principles was followed and re-affirmed in *Hollister v. Hollister*, 6 Barr 449. The same doctrine by a transposition of facts applies to Indiana, and she cannot, therefore, through her courts take jurisdiction of a cause of divorce arising in Pennsylvania between parties always domiciled there, and whose marriage was there contracted. It is scarcely necessary to add ex-

cept for the sake of explicitness, that no supposed constructive notice by publication will change the result. The objection lies back of this, in the want of power in another state to subject the citizens of this to the jurisdiction of her courts. The right to give such notice, falls along with the inability of the court to draw the person of the defendant within its power: Story's Conflict of Laws, sects. 546, 547, 548 and 549.

The next objection to the plea is that the jurisdiction of this court had fully attached, and had been submitted to, before the proceeding in Indiana began, and that the latter is a manifest attempt on part of the respondent to oust our jurisdiction while the case was proceeding here, never responded to, or acquiesced in by the complainant. This will not be tolerated. It will not admit of a moment's argument, to show that an attempt so barefaced, and clearly *ex parte*, can have no force to arrest a decree.

Lastly, this is a manifest case of fraud upon the laws of Indiana. Both law and fact disprove the *bond fide* residence of the respondent in Indiana. In law her residence was here with her husband. *Green v. Green*, 11 Pick. 410, approved in *Hollister v. Hollister*, 6 Barr 451, affirms that the residence of the husband is the residence of the wife. No doubt there are cases where this legal presumption would not be permitted to prevent redress to an injured wife, as in other cases of injury from the husband, where the legal unity must give way to the necessity of redress. But here the facts conspire with the law to show that she had no residence in Indiana whatever, except that which was purposely and fraudulently sought to displace the proceeding pending here. Her residence for about a month in Indiana to initiate the proceeding there, was evidently *mala fide*, and in fraud of the Indiana law, which requires a *bond fide* residence in the county at the time of the filing of the petition. This is the express requirement of the 6th section of the Act of the 13th May, 1852, under which the proceedings began. This *mala fides* brought the applicant there directly within the Act of the 4th March, 1859, which requires the applicant to have been a *bond fide* resident of the state one year before the filing of her petition. It is true the 8th section of the latter law declares that pending applications shall not be affected, but proceeds im-



mediately to except such as are referred to in the following section, the 9th and last of the act, which declares: "Whereas advantage is daily taken of the existing law (to wit, that of 1852) by non-resident parties who are not entitled to divorce, it is hereby declared that an emergency exists for the immediate taking effect of this act, and the same shall be in force from and after its passage." As it is clear the applicant was a non-resident, intending to take advantage of the provisions of the Act of 1852 without title, it is clear the Act of 1859 applies to her case, and cuts it off. Being neither a *bond fide* resident at the time of her application, nor a resident for a year, it is evident that she made a fraudulent use of the law of Indiana.

Upon the whole case the complainant is entitled to a decree, and the plea in bar must be overruled.

Bishop v. Bishop, 6 Casey 412; Reel v. Elder, 12 P. F. Smith 308; Calvin v. Reed, 5 Id. 375; Cox v. Cox, 2 American Reports 415.

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*In the Orphans' Court of Allegheny County.*

IN RE CHESS ESTATE.

(Vol. VII., p. 338. 1860.)

Where the heirs at law of a decedent are all nephews and nieces the distribution is *per capita* and not *per stirpes*.

THE case is fully stated in the opinion.

*Hasbrouck* and *Woods*, for petitioners.

*Shaler*, *contra*.

MELLON, A. J.—The petition in this case sets forth, that William Chess died intestate, without issue, leaving fourteen nephews and nieces his heirs at law, and concludes by praying a partition of the estate into fourteen equal shares.

On behalf of Mrs. Mary W. Miller, one of the nieces, a counter petition is presented, setting forth that said fourteen nephews and nieces are the children and the heirs of the three brothers of the decedent ; that she (Mrs. Miller) is the sole heir of his brother Andrew ; that four of the others are the children and heirs of the brother Robert ; and the remaining nine are the children and heirs of the brother John ; and she insists that the estate be divided into three instead of fourteen shares ; one to be allotted to herself, in right of her father, one to the heirs of Robert, and one to the heirs of John.

This raises the question whether these nephews and nieces are entitled to equal shares in their uncle's estate. In legal phraseology whether they take *per capita* or *per stirpes*. The question has been very fully argued by Messrs. Hasbrouck and Woods on behalf of the original petitioners, and by the Hon. Chas. Shaler on behalf of Mrs. Miller ; and the force and plausibility of the argument of the last-named learned gentleman was such as required the court to take further time till to-day to consider of its judgment.

Our act of 1883, regulating the descent of real estate, necessarily distinguishes between lineal and collateral heirs, but so far as regards the question involved here, it appears to us, the same rule is prescribed for both classes. Children take equal shares in the parent's estate, and a child takes an equal share with the heirs (however numerous) of a deceased brother or sister, but if all the children are dead, and grandchildren only are left, the grandchildren do not take the shares their parents respectively would have taken if living, but take equally, regardless of the number springing from the one parent or the other. This is the rule in lineal descents.

In regard to collateral heirs, the act provides that the estate be divided among the brothers and sisters, and if there are brothers and sisters, and also nephews and nieces, heirs of deceased brothers or sisters, such nephews and nieces shall take the shares their parents would have been entitled to if living : but as in the case of grandchildren in lineal descent, so with nephews and nieces among collaterals ; if there are no brothers or sisters of the decedent surviving, but only nephews and nieces, the

nephews and nieces take in equal shares, and not representatively, the shares of their respective parents, that is they take *per capita* and not *per stirpes*.

The general rule that we deduce from this act, is, that when all the heirs are in equal degree of consanguinity to the decedent they take *per capita*, and when they stand in different degrees of consanguinity, the more remote, take by representation, or *per stirpes*.

When all stand on the same platform of relationship, they are all treated alike ; and although this is an arbitrary rule, resulting from positive legislative enactment, yet it appears to us to possess that degree of natural justice which animates every sound rule of law. If equality is equity it is an equitable rule of distribution. Would it have been regarded as natural in this uncle if in his lifetime he had invited his fourteen nephews and nieces to partake of his hospitalities, that he should treat each of the nine children of his brother John with but one-ninth part of the favor lavished upon the only child of his brother Andrew? The only child is much more likely to be well provided for by its own parent than the nine can be by their parents, and if a distinction were to be made on the score of the fitness and necessity of things, it would be in favor of a larger portion going to the nine than to the one. Every rightminded uncle naturally feels equal affection for his nephews and nieces, regardless of their numbers from different parents ; and the rule of law endeavors to follow and respect what may be supposed to be the desire of the decedent.

Were a brother or sister existing, a relative in a nearer degree of consanguinity, and present with such nephews and nieces, all can feel the difference such circumstance would produce, and the fitness of a different rule of distribution.

If this reading of the Act of Assembly, and the rule we have deduced from it, can be correct, it is virtually a decision of the case. There are here no surviving brothers or sisters ; all stand in equal degree of consanguinity to the decedent ; but the learned counsel for Mrs. Miller points out what he deems to be a construction of the act found in the act itself, on the very point at issue in this case. His argument, if rightfully apprehended, is in substance as follows : Sect. 4, art. 2, provides that if the dece-

dent leaves neither brother nor sister, but nephews or nieces, the real estate shall descend to and vest in such nephews or nieces. It will be observed that no direction is given here as to how it shall descend and vest in such nephews and nieces; whether *per capita* or by representation. Sect. 8 provides that there shall be no representation admitted amongst collaterals, after brothers' and sisters' children. Hence, there being no direction in sect. 4, art. 2, as to how the estate shall vest in nephews and nieces, and sect. 8 providing that after nephews and nieces representation shall cease, it is inferred that by necessary implication it is allowed amongst nephews and nieces; and if so, Mrs. Miller takes one-third of the estate, as the representative of her father.

It is candidly admitted by the learned gentleman that this interpretation conflicts with the interpretation given by the authors of the Act of Assembly (Report of Commissioners of Revised Code, Park & Johnston's Digest, vol. II., p. 782); but he appropriately suggests that, if his be the proper interpretation, it matters not what was the intention of the commissioners; it was the legislature that infused into the act the breath of life; and the legislature may have done this, not because it expressed what the commissioners intended, but because it expressed what the legislature intended to enact, although contrary to the intention of the commissioners of the Code.

It appears to us, however, that, taking the whole act together, the interpretation here contended for on behalf of Mrs. Miller is not sustained. The inference that nephews and nieces take by representation, drawn from the provision in sect. 8, is rebutted by sect. 14, which provides that whenever, by the provisions of this act, the estate shall descend to, and be distributed among, several persons of the same degree of consanguinity, if there shall be only one of such degree, he shall take the whole of such estate; if there be more than one, they shall take in equal shares. This section, taken in connection with sect. 4, art. 2, above recited, is equivalent to a direction, that if there be neither brothers nor sisters, but nephews and nieces, the estate shall descend to and vest in such nephews and nieces in equal shares, or *per capita*. The provision contained in sect. 8 has its legitimate sphere of operation in cases where there are nephews and nieces, and also

the heirs of deceased nephews and nieces, claimants in remoter degree of consanguinity than nephews and nieces; who before the Act of 1855, could not, owing to the proviso in sect. 8, take any share at all; but we find nothing in the Act of 1833 or of 1855 which enables an heir to take by representation, when all stand on the same platform.

The learned counsel refers us also to Fissel's Appeal, 3 Casey 55; Montgomery v. Petriken, 5 Casey 118; Gring's Appeal, 7 Id. 292. In these cases, it is true, distribution is made by representation, or according to classes; but it is because the decedent had so provided by will. Lane's Appeal, 4 Casey 487, is also referred to; but it is simply an application and interpretation of the Act of 1855, and does not touch the question here. The only case in point is that referred to in the Orphans' Court of Philadelphia county (De Haven's Estate, 1 P. L. J. 336), and which would be entitled to due consideration by this court, if we did not arrive at the same conclusion on independent grounds.

The interpretation we have given these sections of our Acts of Assembly is also sustained by the ruling of the Supreme Court of Ohio, upon the provisions of the law of descent of that state, which are very similar to ours. The Ohio case referred to is Ewers v. Folsin, decided in November, 1859.

With these views, the petition of Mrs. Miller and her husband, and the rule granted thereon, must be dismissed; and the case is directed to be proceeded in according to the prayer of the original petition.

Affirmed, 4 Wright 387.

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*In the Common Pleas of Allegheny County.*

RUSSELL v. RUSH.

(Vol. VII., p. 353. 1860.)

1. In the absence of any contract on the subject, or stipulation in the lease, the tenant is bound to do all repairs, and keep the premises in tenantable order at his own expense.
2. Where the lease provided that the tenant was to do the inside repairs, but

was silent as to the outside, and it was shown that the landlord, after the tenancy began, made some outside repairs, the question whether or not an agreement existed that the landlord should do the outside repairs was held to belong to the jury to determine. If the lease was the only evidence on the subject, it would be for the court to interpret it.

3. If a landlord, bound to repair, puts the premises in ordinary good condition and repair, their becoming uninhabitable from other causes constitutes no defence against payment of the rent.
4. It is the tenant's duty to remove temporary or accidental obstructions from drains, spouts, water pipes, and the like, keeping the premises in good order as he received them.
5. Where a landlord, bound to repair, neglects to do so, and in consequence the premises become untenable, and the tenant suffers damage—the tenant has a right to leave, and may set off the actual and immediate damage he has sustained against the claim for rent.

CHARGE, May 17, 1860, by

MELLON, A. J.—The plaintiff sues for two months' rent, due on the 1st of January last, for certain premises in Allegheny City, leased by him to the defendant for one year from 1st of April, 1859, till 1st of April, 1860. The tenant sets up the defence that the landlord did not keep the premises in repair, and that in the first week in December last they became absolutely uninhabitable, by reason of a leak in the roof, or flooding from the spouts, and that in consequence he suffered great loss and damage to his goods and furniture, and was compelled to leave.

The landlord replies to this that he was not bound to repair or keep the premises in tenantable order, but that he did repair and had the premises in tenantable order, nevertheless; and that the flooding or leakage complained of occurred from the tenant's own carelessness or mismanagement, or from an unusual and extraordinary fall of rain and snow, or sleet, accompanied with frost, choking up and overflowing the spouts and gutters.

These questions involve a consideration of the relative duties of landlord and tenant in regard to repairs. In the absence of any contract on the subject, or stipulation in the lease, the tenant is bound to do all repairs, and keep the premises in tenantable order at his own expense. If the premises become uninhabitable, he cannot on that account surrender his lease and by leaving the premises exonerate himself from payment of the rent. The law imposes no obligation on the landlord to repair, unless he is bound

to do so by his contract, and no contract to that effect can be inferred from a lease entirely silent on the subject. What is the evidence in the present case in regard to this point? There is no stipulation in this lease as to any repairs to be done by the landlord. It says, however, that the inside repairs are to be done by the tenant. May it not be inferred from this, taken in connection with the fact that the landlord did certain outside repairs after the tenant went into possession, that a contract existed whereby the landlord was to do the outside repairs? If the lease was the only evidence on the subject, it would be for the court to interpret it; but if the acts of the landlord afford an additional key to its interpretation, it belongs to the jury to decide whether or not the agreement of the parties was that the landlord should do the outside repairs.

In the next place, if you find that it was the landlord's duty to do the outside repairs, did he perform that duty?

If at the time of the alleged flooding or leakage this roof and spouting was in ordinary good repair and condition, the landlord's duty was fulfilled. Was it in such ordinary good repair and condition as a roof and spouting of that slope and material ought to be in to constitute a good roof and spouting of the kind; for under an agreement on the part of the landlord to keep in repair he is not bound to alter or remodel so as to improve. If at the time of the alleged injury, then, these premises were in ordinary good condition and repair, their becoming uninhabitable from other causes, constitutes no defence against payment of the rent. If the loss and injury resulted from an unusual or extraordinary state of the weather at that particular time, it is the misfortune of the tenant; but he cannot visit the consequences on the landlord or dissolve the relation existing between them as landlord and tenant on that account.

Again, if the premises were put in ordinary good repair and condition by the landlord, he was not bound to keep them in good order as regards temporary or incidental obstructions. He was not bound to clear the spouts or conductors, on the roof, of temporary or casual obstructions from ice or rubbish, or the like—not even on notice from the tenant. These are not repairs, but matters required to be done by the tenant, to keep the

premises in good order. And this he is bound to do, whether stipulated for in the lease or not. And if the premises become untenable by reason of temporary or accidental obstructions in drains, or spouts, or water pipes, and the like, it is his own fault. If then from any of these causes, and not from the bad condition and want of repair of the roof or spouting, the injury complained of by the tenant occurred, he cannot set up his loss as a defence to this action. If, on the other hand, you find the landlord was to keep this roof in repair, and he did not do so, and in consequence the premises became untenable and the tenant suffered damage, then and in that case the tenant had a right to leave, and to rescind the relation of landlord and tenant, and might set off the actual and immediate damage he had sustained against the claim for rent.

Long v. Fitzsimmons, 1 W. & S. 530; Cornell v. Vanartsdalen, 4 Barr 373; Bears v. Ambler, 9 Id. 193; Wien v. Simpson, 2 Phila. 158; Hitner v. Ege, 11 Harris 305; Grier v. Simpson, 3 Casey 183.

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*In the Circuit Court of the United States, for the Western  
District of Pennsylvania.*

POLLOCK v. LAWRENCE COUNTY.

(Vol. VII., p. 373. 1860.)

1. An answer should be a counter statement of facts, a confutation of what is alleged by the other party, and should be neither evasive nor argumentative.
2. The annual estimate of the probable expenses of the county for the ensuing year, required by law to be made by the commissioners, is not an appropriation.
3. An appropriation is to set apart or vote a sum of money for a particular object.
4. There is no appropriation of any part of the common fund, until the commissioners, by their warrant on the treasurer, indicate the specific object to which it is to be applied or set apart. It is then severed from the mass and "appropriated," and not before.
5. When unfortunately the current expenses exceed the current income, and all cannot be promptly paid, to the vigilant must be given the first products of the treasury.
6. No capricious application of the public funds by the commissioners, in the



- face of a debt solemnly adjudicated, and after notice of an execution commanding its payment, will be permitted.
7. The execution provided by the Act of 1834, relative to counties, operates as an injunction upon the commissioners, restraining them from drawing any warrant, or making any payment for any purpose whatever, until the judgment is satisfied.
  8. The jurisdiction of a court is not exhausted, by the rendition of its judgment, but continues until the judgment shall be satisfied.
  9. The writ authorized by the Act of 1834 is not the prerogative writ of *mandamus*, for that can issue without a judgment, but this cannot.
  10. Neither is it an original proceeding against the commissioners, but an execution and final process to enforce the payment of a judgment.
  11. There can be no just ground of complaint, when the courts of the United States adopt the process of the courts of the state.
  12. A refusal to obey the command of the execution, will be followed by an attachment against the commissioners.

*Taylor*, for the plaintiff.

*M'Combs*, for the defendant.

The particulars are fully detailed in the opinion of the court, which was delivered, May 31, 1860, by

M'CANDLESS, Dist. J.—This case was tried by a jury at the November Term of the Circuit Court, and a verdict and judgment rendered in favor of the plaintiff for the sum of \$1811 30. On the fourth day of January last, the counsel for the plaintiff issued his writ of special *fi. fa.* authorized by the Act of the Legislature of Pennsylvania, of 1834, and adopted by this court as part of its final process against counties. To this writ the marshal made return that on the 12th of January he had duly served the same on Isaac P. Cowden, Robert Fullerton and Thomas Cains, commissioners of the county of Lawrence, and also upon the treasurer thereof.

The commissioners having failed to pay any portion of the judgment, on the 7th of April plaintiff's counsel presented his petition to the court, charging that at the date of the service of this writ, "there were moneys in the treasury of said county, and subject to the order and warrant of said commissioners, to the amount of \$5800, unappropriated." That since the said service, "there has been received into the treasury and subject to the warrant of the commissioners, the further sum of \$2000.'

Nevertheless that the said commissioners "being minded to evade the payment of the said judgment, and set at naught the process of this court, although often requested, have refused to pay, to the great wrong of the plaintiff, and the contempt of this court." He then prays the court for a rule on the said commissioners, to show cause why an attachment should not issue against them according to law. The rule was granted, returnable at the first Monday of May. On that day the commissioners appeared by counsel, and put in their answer. After admitting the service of the writ upon the 12th of January, they say that, at that date, "there were no unappropriated funds of said county under the power and control of these respondents, and for further answer they show that before the judgment in this case was obtained, and before these respondents knew that the said county would be liable to pay the debt for which it was rendered, the county commissioners of said county had made their estimates of the probable expenses of the said county for the ensuing year, and to the specific purposes embraced in said estimates, and according to the laws of the state of Pennsylvania, all the revenues of the said county were appropriated." They further state, "that the whole receipt of moneys which have come under the control and power of the respondent, as the money of the county, is \$1727 48, and these moneys were solely provided for the purposes of the county, incident to the public weal and the administration of justice."

An answer should be, what its name purports, a counter statement of facts, a confutation of what is alleged by the other party, and should be neither evasive nor argumentative.

This is not a plain, direct statement of facts, responsive to the petition. It is evasive in not stating the amount of money in the treasury at the date of the service of the writ; that we have to glean from the statement of the treasurer. And to support the allegation that there was no money "under their control," it is argumentative in construing the annual estimate of the probable public expenditures to be a specific appropriation to each object.

By the Act of 15th of April, 1834, Purdon 777, "The commissioners of every county shall, at their first meeting, after the general election in every year, proceed to make an estimate of

the probable expenses of the county for the ensuing year. This is no appropriation. It is merely to calculate or compute what will be the probable expenses of the county for the next year, and to levy their tax accordingly. They cannot anticipate the public expenditure precisely, and hence they are to "estimate" the "probable" amount. They cannot foresee the exact amount required for each municipal purpose, and hence they cannot make a specific appropriation.

An appropriation is to set apart, or vote a sum of money for a particular object. And such appropriation, at the date of their annual estimate, would be impracticable, for the reason that a considerable portion of the taxes assessed for the current year are not collected for years after, and much of the ordinary expenditure is paid out of funds which accumulated from the taxes of previous years.

There is no appropriation of any part of the common fund, until the commissioners, by their warrant on the treasurer, indicate the specific object to which it is to be applied or set apart. It is then severed from the mass, and "appropriated," and not before.

The treasurer is the mere custodian of the public money. The commissioners have the control of it; for none can be lawfully drawn from the treasury without their warrant. To them is confided the high prerogative of taxation, and the failure to exercise it, by them or their predecessors, is no legitimate answer to an execution. They are required by law to provide for certain municipal objects, to support their convicts, to build bridges, to maintain their courts of justice; but as the Supreme Court of Pennsylvania says in *Monaghan v. Philadelphia*, 4 Casey 210, "when unfortunately the current expenditures exceed the current income, and all cannot be promptly paid, to the vigilant must be given the first products of the treasury." And again, "no statutory regulation or appropriation by the city councils can give a higher sanction to the liquidation of a debt, than the judgment of a court of justice, in pursuance of law, that the debt is due and must be paid."

So no capricious application of the public funds by the commissioners, in the face of a debt solemnly adjudicated, and after notice of an execution commanding its payment, can be held

guiltless in sight of the law. The execution is an injunction upon the commissioners, restraining them from drawing any warrant, or making any payment for any purpose whatever, until the judgment is satisfied.

If there are no unappropriated moneys, it is to be paid "out of the first moneys that shall be received for the use of said county." The language of the act is plain, and the duty of these officers imperative. They have no option or alternative, and a disregard or disobedience of the writ is followed by attachment.

By the county auditors' report, for the year 1859, there appears to be a balance in the hands of the treasurer of \$6478 42. This is only constructively so, for a large proportion of this sum is in the custody of his predecessors in office, who have not yet accounted for the same. We cannot hold the commissioners responsible for a contempt in refusing to apply what is not actually in the treasury.

But the proofs before the court show, that at the date of the service of this writ of execution, on the 12th day of January last, there was in the treasury in money \$639 86. The treasurer testifies that since that date he has received moneys of the county from other sources than his predecessor, \$1559 78, and from him \$238 45, making in the aggregate \$2438 09, applicable to this execution, and more than sufficient to satisfy the same.

The proofs further show, that, disregarding the command of the writ, from the date of service, to the 11th of May, the commissioners have drawn warrants on the treasurer to the amount of \$3997 74. Thus, in violation of law, and to the prejudice of a judgment creditor refusing to pay his debt "out of the first moneys that shall be received for the use of such county."

We are not here to inquire into the consideration of this judgment. It has received the sanction of a court of competent jurisdiction, and the creditor is entitled to its fruits, as if predicated of a cause of action the most meritorious. It must be enforced, otherwise judicial proceedings would be a mere mockery.

It is proper that the court should have noticed the points submitted in the very able argument of the counsel for the respondents.

1. It is contended that we have no jurisdiction ; that the courts of the United States have no control over state or county officers.

It will not be denied that we have jurisdiction over the parties and the subject-matter, the plaintiff being a citizen of the state of Ohio, the defendants citizens of Pennsylvania, and the sum in controversy is over \$500. Does this jurisdiction terminate with the judgment ? It has been decided otherwise by the Supreme Court of the United States, in 10 Wheaton 23. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised. Were it even true that jurisdiction could technically be said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done ; and would consequently be necessary to the beneficial exercise of jurisdiction.

2. To sustain the second branch of the proposition it is argued that the writ authorized by the Act of 1834, is a mandamus, and an original proceeding against the commissioners. But it is not the prerogative writ of mandamus, for that can issue without a judgment, and this cannot. As the cases cited at the argument show, that was a very imperfect remedy for the creditor, and its deficiency was one of the reasons for the enactment of this law. The Commissioners of the Civil Code in their report of 1832, at page 6, strongly urge its passage by the legislature, because "the mechanic or tradesman who deals with the commissioners in their official capacity, has no ascertained remedy at present, to obtain payment of his demand, but the tedious and expensive course of an application to the Supreme Court for a *mandamus*, which, if obtained, may be from various causes, altogether unavailing." They declined to recommend the sale of county property, but proposed this writ of execution, obedience to which was to be enforced by attachment, "as affording greater expedition than at present exists." It is clear, therefore, that it is an execution to enforce the payment of a judgment ; that it is final process, and not an original proceeding against the commissioners, who are the tangible parties indicated in the act, upon whom all writs are to be served from the beginning.

To avoid prolixity the court need not repeat here what was said in the opinions delivered in the Oelrichs Case (*supra*), and the Dobbin Case as to the legitimate and constitutional power of this court, to add to or alter its process at discretion. There can be no just ground of complaint, when the courts of the United States adopt the process of the courts of the state.

We have adopted this Act of Pennsylvania of 1834, as part of the final process of this court, to enable citizens of other states seeking justice in the courts of the United States, to reap the fruits of their judgments as readily as the citizens of this state, suing in their own courts, and expect a cheerful submission to its provisions.

The respondents, Isaac P. Cowden, Robert Fullerton and Thomas Cairns, Commissioners of the County of Lawrence, having disobeyed the command of the writ of special *fi. fa.*, issued in this case, the rule is made absolute and attachments awarded.

Wilson v. Huntingdon County, 7 W. & S. 197; Morgan v. Township, 2 Miles 397. For form of the writ provided by the Act of 1834, see Hewson v. The Northern Liberties, 1 P. L. J. 322.

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*In a Register's Court, Allegheny County.*

ESTATE OF JOHN CHAMBERS, DECEASED.

(Vol. VII., p. 386. 1860.)

1. Where a petition to the Register's Court to prove the contents and make probate of an alleged lost will was dismissed, and the administrator, previously appointed, made distribution of the personalty, and the heirs at law, by proceedings in the Orphans' Court, made partition of the real estate, and subsequently the alleged will was found—upon application made for its probate the only question for the Register's Court is the due execution of the paper produced, and its continued existence to the time of his death, as the last will and testament of the decedent. If the proofs are conclusive in the affirmative, probate will be granted, as of course.
2. The administrator in such case is protected in the administration by Act of 24th February, 1834, section 68.
3. Our Acts of Assembly prescribe no time within which a will must be probated.

MELLON, A. J.—John Chambers died in 1855, and on the 18th March, 1856, a petition was presented to the register, asking that the Register's Court be convened to inquire as to the contents and validity of the last will and testament of the decedent, which it was averred had been lost or mislaid. In pursuance of this petition the Register's Court was convened on the 24th of April, 1856, and much testimony adduced on the subject, which tended to establish two propositions, viz. :

1st.—That the deceased had made a will.

2d.—That he himself had afterwards destroyed it.

This petition, to prove the contents, and probate the alleged lost will was, therefore, dismissed, and the administrator, to whom letters had before been granted, proceeded with the administration, and made distribution of the personalty; and the heirs at law, by proceedings in the Orphans' Court, made partition of the real estate.

In January last, however, the tenant, in the house where Chambers died, discovered the will, carefully put away in a nook of the chimney, and upon application to the register for its admission to probate, this court is again convened, and the testimony now adduced establishes the will. Indeed it is not attempted to be denied or controverted. The only difficulties suggested are the distribution of the personalty and partition of the realty and rights acquired by third parties in parts thereof differing from the provisions of the will.

These may be serious questions to the parties concerned, and may evolve interesting legal questions in the courts to which they belong, or may be litigated, but the only question before this court now, is the due execution of the paper now produced, and its continued existence to the time of his death, as the last will and testament of the decedent; and on that question there can be but one opinion under the testimony. Our Acts of Assembly prescribe no time within which a will must be probated. The 68th section of the Act of 24th February, 1834 (Purd 195, sec. 58), contemplates the occurrence of a case of this kind, and protects the administrator in the administration, but is silent as to the distribution of the personalty and the partition of the realty.

If the matter, now before the court, had been adjudicated, and

a decree made therein when originally before the court, it might be necessary now to consider the power of the court, and the propriety of opening that adjudication or setting aside such former decree; but as the original application was simply dismissed, there appears to be no irregularity in the present petition and direct application for the probate of the will.

Therefore, on consideration of the testimony now adduced and taken in writing and hereto attached, the paper writing, now produced to the court, is deemed to be duly proved, as and for the last will and testament of the said decedent; and it is ordered, adjudged and decreed that said paper writing be, and the same is hereby taken as proved and admitted to probate, as and for the last will and testament of John Chambers, late of Chartiers township, in said county, deceased.

See Cook's Estate, 1 Phil. 342.

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*In the District Court of Allegheny County.*

IN RE WALLACE'S ESTATE.

(Vol. VII., p. 401. 1860.)

1. The true construction of the Act of Assembly, regulating sheriff's sales of real estate, requires notice to be given in two newspapers for three full weeks or twenty-one days previous to the sale.
2. When the sheriff is selling property by parcels, whenever he has sold enough to pay the debt, interest and costs of his writ or writs, he ought not to sell any more.
3. In sheriffs' sales the law requires a description of the buildings whenever they are of any appreciable value, or would induce purchasers to bid more, but not otherwise.
4. Where the levy embraces lots, sold by the debtor, on some of which the purchase-money was fully paid, and on others but partly, the sheriff should first sell those on which a balance remains unpaid, before proceeding to sell those fully paid for.

In the matter of the exceptions to the acknowledgment of the sheriff's deed for the real estate of Thomas Wallace, deceased.

*Acheson & Sterrett*, for exceptants.

*Shaler & Koethen*, for purchasers.



The following opinion of the court was delivered, June 27, 1860, by

HAMPTON, P. J.—The property in controversy was sold by the sheriff under a second *pluries* writ of *lev. fa.* in favor of Thomas Holmes et al., for use of Benjamin Lutton, against the executor of Thomas Wallace, deceased.

The writ came into the hands of the sheriff on the 23d of March, 1860, and the property was advertised on the 6th of April and sold on the 23d of the same month. Exceptions were filed to the acknowledgment of the sheriff's deed, on behalf of the widow and heirs of said deceased, as well as Martin Reardon, a vendee of Wallace and Blakely, and Thompson Bell and others, judgment creditors. The first in each set of exceptions is the same, viz: "Want of due notice of sale."

This exception is first in importance, as affecting our practice, as well as first in order of time. On behalf of the exceptants, it is contended that a true construction of the Act of Assembly, regulating sheriffs' sales, requires notice to be given in two newspapers for three full weeks or twenty-one days previous to the sale, and it is asserted that the practice here has been invariably in accordance with that construction, ever since the passage of the Act in 1836 till the last term of this court.

On the other hand it is contended that a publication of the notice once a week, on any day, in three successive weeks, is all the act requires.

There is no doubt but that the practice in this county ever since the Act of 16th June 1836 was passed, down till within a very short time at most, has been to give three full weeks, or twenty-one days' notice, previous to the day of sale. A practice so long established, and so well known by the people, whose interests are affected by its operation, ought not to be changed without good and substantial reasons, which we have failed to discover in this case. In 1 Harris 291, C. J. Gibson says: "Contemporaneous practice is a powerful interpreter of doubtful meaning, and when long continued by common consent, as in this instance for more than twenty years, it is irresistible." Again, in 1 Dall. 136, it is said: "The opinion of the court is conformably to the invariable practice in every county of this state, from

the date of the act to this day, and the construction given to an act immediately after its passage cannot be altered at so distant a period, even although it might have been a little erroneous in the first instance."

Let us now examine very briefly the act under consideration, and see whether or not the invariable construction given to it ever since its passage be correct.

The 68d section of the Act of 16th June, 1836 (Dunlop 738), when its different parts relating to this question are read together, provides that "the officer shall also give notice of every such sale, by advertisement \* \* in at least two newspapers \* \* \* once a week, during three successive weeks previous to such sale."

Now, if the construction contended for by the counsel for the plaintiff in the execution be correct, the requirements of the act would be complied with by publishing in two of our daily papers, on Saturday of one week, and Saturday of the next week, and Monday of the succeeding week, and the sale might take place the next day, which would be only ten days' notice before the day of sale. This would be the case in the cities where daily papers are published. In the country districts, as we all know, their newspapers are published weekly. Then, if the two papers happen to be published the same day, say on Wednesday, the sale might take place on Thursday, the sixteenth day after the first publication. Now, it is well known that these country papers are frequently four, five or six days reaching their subscribers, thus making the period of the notice, actually given, not more than ten or twelve days.

The provisions of this Act of Assembly were designed for the benefit of the people at large, whose interests were to be affected thereby, and hence they are to receive a popular construction; or in other words, the act is to be construed according to the plain, ordinary meaning of the language employed. And if that rule of interpretation be employed, there can be no doubt of the result; perhaps it would not be extravagant to say, that ninety-nine out of every hundred common minds would understand it to mean that there must be three weeks' notice, and it seems to me it would require a microscopic view of the act to arrive at any other conclusion.

We are, therefore, of opinion that the only and invariable construction of this section, all over the state, so far as we know, with one solitary exception, is literally and technically correct, and that the inveterate and continued practice, in accordance with that interpretation, is the true one, and ought not to be disturbed.

Here the property was first advertised on the 6th of April, and was sold on the 23d, making the notice only seventeen days, which falls short of the notice required both by the law and the practice in this county for a period of more than twenty-one years. This sale must, therefore, be set aside.

The second exception, by widow and heirs, is to be dismissed. The manner of sale was in accordance with the order of this court, and we see no reason to change it.

The third exception, by the widow and heirs, is based on the alleged inadequacy of price. As the sale is to be set aside on other grounds, it is unnecessary to consider this question; and the same may be said of the fourth exception, by widow, &c., and the third by the judgment creditors. It is undoubtedly true that when the sheriff is selling property by parcels, whenever he has sold enough to pay the debt, interest and costs of his writ or writs, he ought not to sell any more.

The fifth exception, by the widow and heirs, and third by the creditors, refer to the want of description of the buildings. On this subject the proof is very defective. The law requires a description of the buildings, whenever they are of any appreciable value, when a description of them would be at all likely to enhance their value in the estimation of the bidders. But a mere shell of a building, which is not tenantable or fit for use, and which, if described in the notice, would not induce a purchaser to bid a farthing more for the property, need not be described. The law does not require a vain thing.

The fourth exception on behalf of Martin Reardon and the judgment creditors has reference to the sale of lots Nos. 70 and 71, which had been purchased by him from Wallace & Blakely, and the purchase-money paid in full. We are of opinion that the sheriff should have sold lots Nos. 68 and 69, upon which a bal-

ance of purchase-money is still due and unpaid, before proceeding to sell the lots purchased and paid for by Reardon.

This disposes of all the exceptions. We are unwilling a second time to set aside the sale of this property, by which the judgment creditors are delayed in the collection of their just dues; but this novel practice, attempted to be set up, of giving only some twelve or fifteen days' notice of the time and place when and where a man's real estate is to be sold by the sheriff, cannot be tolerated.

The sheriff's sale is set aside.

See cases cited in *Clarke v. Chambers*, 1 Pittsb. 222, and in the notes to *Purdon*, ed. 1861, p. 442.

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*In the District Court of Allegheny County.*

MILLER v. VARNER.

(Vol. VII., p. 401. 1860.)

1. In an action of slander for maliciously charging the plaintiff, a practising physician, with being a quack and having killed the defendant's child, evidence, offered to enhance damages, that a rumor prevailed, extensively, in the neighborhood, that defendant had so spoken of plaintiff, is inadmissible.
2. One cannot be responsible for the repetition by others of a slander uttered by him.
3. *Chapman v. Calder*, 2 Harris 365, is so defectively reported as to be no authority on this point.

ON motion for new trial. *Reed and Hampton*, for plaintiffs, *Hamilton and Acheson*, for defendant.

Opinion delivered June 23, 1860, by

WILLIAMS, A. J.—This is an action of slander for maliciously charging the plaintiff, who is a practicing physician, with being a quack, and having killed the defendant's child.

Upon the trial, after the plaintiff had proved the speaking of the slanderous words by the defendant, on five different occasions, in the hearing of different persons, he was allowed under objection and exception by the defendant, to prove by other

witnesses "that they had heard in the neighborhood, where the parties reside, and prior to the bringing of this suit, that defendant had charged the plaintiff with having killed his child, and that the subject was generally talked of in private as well as public places, for the purpose of showing the extent the slander had been circulated to the injury of the plaintiff as a physician." The jury found for the plaintiff, and assessed his damages at \$——.

The defendant has moved for a new trial, mainly on the ground that the evidence excepted to was improperly admitted. To sustain the ruling of the court the plaintiff relies on the case of *Chapman v. Calder*, 2 Harris 365. This was an action for libel, charging the plaintiff with violence, fraud and perjury. According to the report, "after other evidence had been received, the plaintiff's counsel, as rebutting evidence, called Paul S. Preston, as a witness, and offered to prove by him what rumors were in circulation in relation to the plaintiff's swearing false before Jones. To this evidence the counsel for the defendant objected. The court overruled the objection and admitted the evidence, to which the counsel for the defendant excepted." The admission of this evidence constituted the defendant's third bill, and was one of the errors assigned. In reference to which the court say: "We see no error in the admission of the evidence contained in the third bill. It was certainly competent for the plaintiff to show by whom the rumors were put in circulation, whether by the friends of the plaintiff or the defendant." This is all that we have on the subject. There is nothing to indicate what the rumors in circulation were, by whom they were put in circulation, or what they were intended to abut; and, consequently, nothing to show the precise point decided by the court. The offer, as given in the history of the case, was to prove by the witness "what rumors were in circulation," and the court say: "It was certainly competent for the plaintiff to show by whom the rumors were put in circulation." There is no syllabus showing the point ruled by the court on this bill of exception, and it is impossible to glean it from any part of the report. In this respect the case is so defectively reported as to be utterly worthless as an authority, disgraceful to the reporter and scan-

dalous to the court whose opinions he was undertaking officially to report. Whatever the point decided may have been, it is certain that it could not have been the same as that which is raised by the admission of the evidence in this case.

To show that the evidence was improperly received, the defendant's counsel relies on *Rutherford v. Evans*, 19 E. C. L. R. 281, and *Ward v. Weeks*, 20 Id. 104. In the former of these cases, it is ruled that in an action of slander, the plaintiff, in showing special damage, must confine his proof to the evidence of persons who received the slanderous statements from the defendant himself, and in the latter it was held that the allegation of special damage from words spoken by the defendant could not be supported by proof that the defendant had spoken the words to B., and that damage ensued in consequence of B.'s repeating them as the words of the defendant.

The principle on which the decision in these cases rests, seems to be this: that a man is only answerable for the necessary consequences of his own wrongful acts; that the repetition of his slanderous words, or the publication of the fact of his utterance thereof, by another, being the voluntary act of a free agent over whom the slanderer has no control, cannot be considered as the necessary consequence of the original uttering of the words. It is easy to see that the application of this principle would exclude the evidence admitted in this case. But the very point is decided in *Leonard v. Allen*, 11 Cush. 241. It was there ruled that the plaintiff, in an action of slander, cannot show, in order to enhance the damages, that it was currently reported in the neighborhood that the defendant had charged the plaintiff with the crime alleged in the declaration. These authorities show that the evidence, excepted to by the defendant in this case, ought not to have been received. It is possible that in point of fact it may not have had the effect of increasing the damages. It may be that, if it had not been given the jury would have found the same amount. But it was offered for the purpose of aggravating the damages, and the court cannot say that it did not have this effect. If the contrary clearly appeared, a new trial would not be granted. The damages found by the jury are not excessive. The words spoken by the defendant were grossly

slandrous, and if believed, calculated to do the plaintiff great harm in his profession. They were proved to have been uttered, in the hearing of different persons, on at least five different occasions. The testimony of Dr. McCook shows that there was no foundation whatever for the charge. The child was dead before the plaintiff was called to assist in its delivery. Since the trial the plaintiff has offered to release all the damages found by the jury, if the defendant would retract the slander. But he refuses to retract, and insists upon a new trial. And because the court admitted evidence, showing that the fact of his having slandered the plaintiff was currently reported, and generally known in the neighborhood, a fact that might be well inferred from the number of times the slander was proved to have been uttered by the defendant himself, a new trial must be granted. Whether the defendant, fare better or worse, on another trial, he is entitled to have the finding of the jury based only on competent and proper evidence.

It is, therefore, ordered that the verdict in this case be set aside, and a new trial awarded.

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*In the District Court of Allegheny County.*

IN RE RULE ON JAMES E. BROWN.

(Vol. VIII., p. 1. 1860.)

1. The principles of comity and reciprocity recognised in admitting attorneys on certificates from other states are applicable only to citizens of other states, and not to our own citizens.
2. Even a citizen of another state cannot claim admission here as a matter of right, on faith of his certificate; he can ask it only as matter of grace.
3. Our courts have the right, and it is their duty under the Act of 1834, to require that the applicant from another state be "learned in the law," as if he were a citizen of our own state.
4. When an attorney has been admitted under a misapprehension of facts which if known to the court would have prevented his admission, the court will rectify the mistake, when duly moved thereto by striking his his name from the roll.

ON the 28th of May, 1859, James E. Brown, Esq., of Kittanning, in this state, was on motion of *R. B. Carnahan*, Esq., a member of the examining committee, duly admitted and sworn in open court, as an attorney of the District Court, upon the faith of a certificate from the Judges of the Supreme Court of the state of Illinois.

October 8, 1859, Mr. *Carnahan*, on behalf of the examining committee, entered a rule on James E. Brown to show cause why his name should not be stricken from the roll of attorneys, for the alleged reason that a fraud had been practised on the court and committee as to his residence, &c. See reasons in opinion, *infra*.

To this the respondent filed the following

ANSWER.—The respondent, reserving to himself all manner of exception and objection, as well to the form and manner of this proceeding as to the vagueness and insufficiency of the reasons filed, for answer thereto, or so much thereof as he is advised it is proper for him to answer, saith as follows, to wit:

1st. Your respondent in reply to the first reason filed, says:—That in the month of March, A. D., 1859, he was duly admitted to practice as an attorney and counsellor-at-law of the several courts of the state of Illinois, by the Supreme Court of said state, in conformity with the provisions of the statutes and laws of said state, as evidence of which your respondent herewith submits his certificate of admission, under the seal of said Supreme Court, a copy of which is hereto annexed, and begs leave to treat it as part of this answer; and further submits that such certificate is conclusive evidence of such admission, and the verity thereof cannot in this proceeding be impeached or controverted, but that it is entitled to full faith and credit as a decree of said Supreme Court.

2. Your respondent therefore submits, that when admitted to the bar of the District Court of Allegheny county, on the 28th day of May, A. D., 1859, he was a practising attorney and counsellor in good standing of the Supreme Court of the state of Illinois, and as such entitled, by reason of the reciprocity and comity existing between the said courts, to admission to the said District Court of Allegheny county; and while your respondent



denies the relevancy of the question of practice, or the right of any person to inquire of him concerning the same, yet he is free to say that within the brief interval of two months and ten days between his admission in Illinois and his admission to the Pittsburgh bar, as an attorney and counsellor thereof, he had been engaged and interested in the practice of law in said state of Illinois.

3. Your respondent further protesting against the relevancy of the question of residence or citizenship, as raised by the latter clause of the first reason filed, yet desiring to evade nothing from which any inference of guilt might be drawn, here most positively denies that he ever made any misrepresentation to R. B. Carnahan, Esq., respecting his residence or citizenship, neither were any such misrepresentations made by him to any other member of the committee of examination, nor to the court. And your respondent here affirms that no question as to his residence or citizenship in Illinois was asked of him by any member of said committee or by the court prior to his admission; and your respondent therefore answers, that that part of said reason which charges fraud upon your respondent is utterly untrue.

4. Your respondent further answers that at the time of his application for admission to the bar of this honorable court, he relied upon his certificate from said Supreme Court of the state of Illinois, and the comity existing between the courts of Illinois and the courts of Pennsylvania, as shown by the Revised Statutes of Illinois and the rules of this honorable court, and here your respondent begs leave to introduce a copy of an extract from the said statutes of Illinois, which was submitted to the inspection of the said R. B. Carnahan, Esq., on the day said Carnahan moved his admission to this honorable court, which, by reference to the Statutes of Illinois, published by D. B. Cook & Co., 1858, by authority, on page 677, of volume first, at the 10th section of Chapter XI., will be found as follows, to wit: "Any person producing a license or other satisfactory voucher, proving that he hath been regularly admitted an attorney-at-law in any Court of Record in the United States; that he is of good moral character, may be licensed and permitted to practice as a counsellor or attorney at-law in any court in this state, without examination."

And at section 13 of same chapter, as follows: "Hereafter, when any counsellor or attorney at law, residing in any of the adjacent states or territories, may desire to practice law in this state, such counsellor or attorney shall be allowed to practice in the several courts of law and equity in this state upon the same terms and in the same manner that counsellors and attorneys at law residing in this state now are, or hereafter may be, admitted to practice law in such adjacent states or territories."

In further illustration of comity, your respondent begs leave to refer to the latter part of Rule 27 of this honorable court, which reads as follows, to wit: "and the court may also, at its discretion and upon similar terms, admit persons admitted to practice in the courts of those states which extend the like privileges to the attorneys of this state."

And further, your respondent begs leave to state that he has been informed, and has good reason to believe, that two members of the bar of the state of Pennsylvania—the one from Allegheny county and the other from Indiana county—were, without examination, upon producing certificates of admission from their respective bars in this state, admitted to practice in the several courts of the state of Illinois.

5. Your respondent further says that he is informed that about twelve days prior to his admission to the bar of this honorable court, his certificate from Illinois was submitted to R. B. Carnahan, Esq., and two other members of the examining committee, to whom it was stated that he was willing to submit to an examination, if required; and that he resided in Kittanning, but had been obliged to spend a considerable portion of his time in Chicago last fall and winter, and when there made application for admission to the bar; and that the said members of committee were perfectly satisfied with the certificate, and stated that should the respondent present himself, he would be admitted.

Your respondent further says, that he is also informed and believes, that on the day of his admission in Pittsburgh, one of the other two members of the board of examination above referred to, being present in this honorable court, expressed his desire to Robert Pollock, Esq., that the motion for your respondent's admission should be made by R. B. Carnahan, Esq. And your

respondent further saith, that the motion of Mr. Carnahan for his admission was based upon the said certificate (which Mr. Carnahan read in open court) and the comity aforesaid.

6. Your respondent further saith, that the member of committee who desired the motion to be made by Mr. Carnahan, has been long acquainted with him; that the law firm of which the said member is an active partner, has been employed by your respondent, and has brought and attended to several suits at his request, and collected and paid money over to him; and furthermore, that the said member has been at the house of respondent in Kittanning, and acquainted with his character and position; that your respondent is well known to many of the members of the Pittsburgh bar, some of whom were present at his admission; that your respondent has good reason to believe that R. B. Carnahan, Esq., was, before he moved your respondent's admission, informed of his residence, position and business; that your respondent has been a frequent visitor in Pittsburgh during the last forty years, transacting business there, and that for more than eight years he was the principal partner in the firms of Brown, Phillips & Co., and their successors, Brown, Floyd & Co., who had warehouses on Water street, in said city, and were engaged in the iron business, and believes his standing, position and residence to be well known to a large portion of the business men of the city, as well as to members of the legal profession. And, under all these facts and circumstances, your respondent submits that it would have been impossible for him, even had he been desirous of doing so, to have committed the alleged fraud upon this honorable court or upon the board of examiners thereof.

Your respondent further saith, that his only interview with R. B. Carnahan, Esq., before he moved your respondent's admission, was for a very few minutes in the rotunda of the court house, and in presence of R. Pollock, Esq.; and that after his admission, and before he retired from the court room, Mr. Carnahan inquired of your respondent whether he intended then to remain in the city, to which your respondent replied in the negative and informed Mr. Carnahan that he was then on his way home to Kittanning.

In answer to the second reason filed, your respondent saith, that whilst he respectfully submits that the matters and things therein set forth are neither relevant nor important to the matter in issue, yet, desirous of meeting this charge upon its merits, and shrinking from no responsibility connected therewith, states and saith, that at no time was he required by this honorable court or any member of this bar to submit to an examination; but, on the contrary, was informed, as before stated, that it was unnecessary. And further, your respondent states that he practised no fraud nor falsehood upon this court, nor upon the Board of Examiners; but answers now, as he has before answered, that at the time of his admission to the bar of this honorable court, he was, and still is, an attorney and counsellor at law of the several courts of law and equity of and within the state of Illinois, and is and has been concerned in important causes in the said state of Illinois. And further, whilst your respondent protests against the relevancy of his legal learning to the inquiry here, yet states that when a young man he held the offices and performed the duties of prothonotary, clerk of the Court of Oyer and Terminer, and clerk of the Court of Quarter Sessions of Armstrong county, for about three years, the business of which being limited, much of his time was employed in reading law and pursuing the study of Latin. Afterwards he read law under the direction and at the request of Thomas Blair, Esq., then a distinguished lawyer of the same county. Your respondent held the commission of justice of the peace of the said county for fifteen years, had an extensive practice, and continued to read law, investigate closely and apply its principles and legal decisions to cases presented before him, and to the present time has still pursued his legal reading and investigation; has for more than forty years been a scrivener and conveyancer with large practice; for perhaps thirty years past has been an extensive land agent, and has aided in preparing and conducting successfully numerous important land cases, and succeeding in compromising favorably a still greater number; all of which required the careful reading and study of the land and tax laws of this state; and his accuracy and ability as an agent have met with the approbation of his honor, Judge Watts, and other distinguished gentlemen; and, if necessary,

your respondent can submit ample testimony from eminent members of the profession of his legal business acquirements; and now begs leave to offer the following :

1. F. Watts, Esq. (since judge, &c.), in his letter of December 18th, 1839, writes: "It affords me pleasure to say, that in the midst of complicated difficulties of settling this estate, your account was one bright spot—it was clear, plain and satisfactory."

2. A distinguished judge, referring to a most difficult and complicated concern, in which another gentleman was associated with respondent, but which was mainly conducted by respondent (as was well known to his honor), in a written opinion used the following language: "From the known ability and acknowledged capacity of the gentlemen concerned," &c.

3. About eighteen years since, an eminent lawyer in extensive practice at the Kittanning bar, offered your respondent a full partnership in his law business.

Your respondent further saith, that in multitudes of cases he has been consulted respecting legal matters, amongst others, by gentlemen of intelligence, of wealth, and of the legal profession, and that many of them, suggesting his fitness, have importuned him to seek admission to the bar.

Your respondent—although it may be irrelevant—would respectfully beg leave to state that, to his long and attentive reading and study of legal science and his practical acquaintance therewith, gained in his various business relations, he has made acquisitions in other departments—among which he would mention mathematics, the Latin and German languages, and also natural science—particularly chemistry, mineralogy and geology, of which he has had much practical knowledge. He was an acting civil engineer on the public works of this state, in the corps, and then ranking with Messrs. E. Miller, S. W. Roberts and T. J. Powers, and is an experienced practical surveyor, accountant and business man, and as such, well known.

Your respondent further states, as evidence that no fraud was practised by him on the Pittsburgh bar, that although his admission thereto occurred on the 28th day of May, 1859, a period of four months and ten days was allowed to pass before the motion

for the rule to show cause was made, or notice of it was given to him.

In conclusion, your respondent submits that the dignity of the legal profession is not violated, neither in the moral character, legal learning, professional ability, scientific knowledge, literary attainments, or business capacity and integrity of your respondent; but on the contrary, your respondent cannot believe that this proceeding is instituted to vindicate the honorable profession of the law, but believes that gross misrepresentations have been made to the honorable board of examiners of this county, and that opponents of your respondent, as well of Kittanning as of Pittsburgh, have entered into a conspiracy to oppress and annoy him, and that this is but an overt act of such conspiracy; in corroboration of which—besides oral information—your respondent now holds a letter from a gentleman (believed to be one of said conspirators) highly offensive to your respondent, and greatly tending to a breach of the peace. Wherefore your respondent submits, that in nothing has he committed any fraud upon the honorable court or upon any committee thereof—nor has he at any time consented that any such thing should be done, but in all things hath demeaned himself as an upright member of this bar: all of which he is ready and willing to show to this honorable court at such time and in such manner as this honorable court may direct, and prays that the rule to show cause may be discharged, and your respondent dismissed hence, with his reasonable costs and charges, in this behalf most wrongfully sustained.

Depositions were taken on both sides. The more relevant facts developed thereby are referred to in the opinion below.

The matter was argued March 25th, 1860, by

*Marcus W. Acheson*, Esq., for complainants.

*Samuel A. Purviance*, and *Edward S. Golden*, for respondent.

The opinion of the court was delivered, June 30th, 1860, by  
HAMPTON, P. J.—The circumstances attending this case, as

disclosed by the evidence, are of such a character as to demand our most careful and serious consideration.

On the 28th of May, 1859, while the Court was engaged in the transaction of its ordinary business, Mr. Pollock, a member of this bar, came up to the bench and made some inquiry as to the mode of admitting attorneys from other states to this bar. The court informed him that our rules required his application to be first made to the board of examiners, and if they gave him a certificate, or if one of their number moved his admission, we took it for granted it was all right, or words to that effect. Afterwards Mr. Carnahan, a member of that board, moved the admission of James E. Brown as an attorney of the state of Illinois, producing at the same time the certificate of the judges of the Supreme Court of that state, dated the 8th day of March, 1859, under the seal of said court, setting forth that James E. Brown of "Cook county" in that state, was duly qualified and licensed to practice law in the several courts of the state.

This certificate was not examined by the court at the time, but was supposed to be in due form, as the seal of the court was said to be attached to the paper, with the certificate of the clerk that it was in due form, and that said Brown had been duly qualified and admitted as an attorney of that court.

A careful examination of this paper since the hearing of this rule, discloses some very extraordinary features. The first part of it contains a certificate signed by three judges of the Supreme Court of that state, as follows, viz :

"Supreme Court, State of Illinois. Jas. E. Brown, of Cook county, Illinois, having exhibited to the undersigned, the justices of the Supreme Court of the State of Illinois, satisfactory evidence of his good moral character, and of his qualifications for admission as an attorney and counsellor at law, we do therefore hereby authorize the said Jas. E. Brown to appear in all the Courts of Record in the state of Illinois, both of law and equity, and therein to practice as an attorney and counsellor at law, according to the laws and customs of said state for and during his good behavior in said practice."

Dated 8th March, 1859.

Thus far this document seems to be regular enough, and would confer authority on any of the courts of that state to admit Mr. Brown to practice therein, on his appearing in open court and taking the oath prescribed by law.

And this might be presumed from the certificate and seal of the Clerk of the Supreme Court, but for the fact that it also appears on the same paper that he was sworn before a notary public in Armstrong county, Pennsylvania. The following is a copy of this part of the record, so much relied on by the respondent, as importing absolute verity, viz :

“ STATE OF PENNSYLVANIA, ARMSTRONG COUNTY, *ss* :

I, James E. Brown, do solemnly swear, that I will support the Constitution of the United States and of the state of Illinois, and in all things faithfully execute the duties of an attorney and counsellor at law, according to the best of my understanding and abilities.

JAS. E. BROWN.”

“ Sworn and subscribed before me this 12th day of March, 1859.

GEO. S. ROHRER, N. P.”

Then follows the certificate of the Deputy Clerk of the Supreme Court, by which it is manifest the name of Mr. Brown was enrolled as an attorney of that court, on the oath he had taken before the notary public in Kittanning, without ever being present in the Supreme Court, or any motion made for his admission. This certificate is dated the 18th of March, six days after the date of his oath before the notary, so that the probability is, the paper was either sent or handed to the clerk, and he certified it and sent it back.

Aside from the want of authority in the notary public to administer such an oath, I am quite sure this will be regarded by the profession as a novel mode of admitting a person as a member of the bar.

In justice to the Supreme Court of Illinois, we ought to express our decided opinion that if the facts in regard to this certificate were brought to their notice, they would at once, and without the slightest hesitation, strike his name from the roll of attorneys, as having been entered there without any authority.



Another certificate was also produced from the Circuit Court of Wisconsin, stating that James E. Brown, Esq., was, on the 23d day May, A. D., 1859, duly sworn in open court as an attorney and counsellor at law and solicitor in chancery.

The court remarked, in substance, to Mr. Carnahan, that as he was a member of this committee, this application was presumed to be right, and being answered in the affirmative, Mr. Brown was at once admitted and sworn by the clerk.

The court took it for granted that the applicant was a resident attorney of the state of Illinois, as no intimation whatever was given that he was at the time, and had been for a period of forty years, a citizen of Pennsylvania, residing in Kittanning, in the adjoining county of Armstrong, as since disclosed by the evidence.

On the 8th of October, 1859, Mr. Carnahan, on behalf of the board of examiners of this bar, entered a rule in this court to show cause why James E. Brown should not be stricken from the roll of attorneys of this court, for the following reasons, viz :

1st.—Because he was admitted under representations that he was a practising attorney in the state of Illinois, when in truth and in fact he never was a citizen of the state of Illinois, but has resided in Armstrong county for a long time.

2d.—Said Brown was admitted without examination, and practised a fraud upon the court and board of examiners, by representing that he was a practising attorney in the state of Illinois, when in truth he never practised law in Illinois, or elsewhere, and is not known to this court to have ever studied law.

Under this rule the respondent filed an answer, and a number of depositions were taken on both sides.

Three questions are raised by this record and the evidence in this case.

1st.—Was there any fraud practised either on the committee or the court in procuring the admission of the respondent to the bar ?

2. If there were no fraud, did the committee and the court act under an entire misapprehension of the facts in the case ?

3d. If so, is the mistake of such a character as to require the rule to be made absolute ?

Waiving the alleged fraud, let us see how the case stands on the question of mistake.

The evidence shows quite conclusively that neither the committee, nor the member who moved his admission, knew, or had any reason to suppose, that the respondent resided in this state; but on the contrary that he was a citizen of the state of Illinois, who had come here to transact some particular business in the line of his profession. Such I know was the impression made on the mind of the court, by all the circumstances attending the transaction. But it is said no such statement was made by the respondent, either to the committee or the court. This may be true, and yet both the committee and the court might very naturally be led into error, by the exhibition of his certificate, which stated on its face that he was of "Cook county," Illinois.

But it is said the name of the place where the court is held is usually inserted as the residence of the applicant. But in this instance it does not appear that the court was in session anywhere, and the certificate of the clerk is dated "Ottawa."

It is said again that his place of residence has nothing to do with the question now before us, that we are bound by the principles of comity and reciprocity to admit the respondent simply on the faith of his certificate. This, I apprehend, is a very great mistake. The principles of comity and reciprocity in this respect are only applicable to citizens of another state, and not to our own citizens. But even a citizen of another state cannot claim admission here as a matter of right; he can only seek it as a matter of grace. The respondent here was, at the time of his pretended admission in Illinois, a citizen of Pennsylvania, and therefore the doctrine of reciprocity does not apply to him.

But if this were otherwise, if he had been a *bonâ fide* citizen of that state, it does not follow that he ought to be admitted here, merely on his certificate of membership there.

By the law of this state, the courts have power to admit a competent number of persons of an honest disposition and "learned in the law," to practise as attorneys within the courts. And they may, in their discretion, admit attorneys from other states, which recognise the principles of reciprocity in regard to attorneys going from this state. But, this, as we have already

said, is done by courtesy, merely, and cannot be claimed as a matter of right. Our courts have the same right, and ought invariably to exercise it, to look beyond the certificate, and to require one coming from another state to "be learned in the law," as if he were a citizen of our own state. Any other rule would work an unjust and invidious discrimination against our own citizens, and operate very injuriously against the members of the bar of this state. Indeed, we have no power, under the Act of 1834, to admit any one who is not learned in the law, and hence our rule requiring all those who desire to be admitted to this bar, coming from another state, to make their application to the committee. And it is the imperative duty of that committee, before they grant their certificate, to be fully satisfied that such applicants have brought themselves clearly and distinctly within the requirements of the Act of Assembly and rules of court.

The court relies on this committee for information in regard to the qualification of every applicant for admission; and hence too much caution, care and vigilance cannot be exercised by its members.

A certificate by a court in another state, simply proves, when properly authenticated, that its recipient was duly admitted according to the law and practice of that state—nothing more. Now suppose that state had a law authorizing any person who might apply to be admitted and practice as an attorney, without any previous course of study whatever, would our courts be bound, or at liberty even, upon the mere certificate of membership, to admit such a person to practice here? Clearly they would not. Otherwise, any person residing in this state might evade the provisions of our wise and salutary law by a week's absence in the west, and returning with his certificate, demand admission here, in defiance of our Act of Assembly, and the practice of our courts from time immemorial.

It is manifest from the admitted facts in this case, that the respondent was not entitled to admission here without the aid of his western certificates. He had not complied with our Act of Assembly and rules of court in relation to the admission of members of the bar. Either he, or his adviser, was made aware of the fact that he could not be admitted in his own county by the

aid of any certificate he might procure in other states, and hence it was determined to try the experiment here. And instead of making application to Mr. Penny, who was one of the committee, and who had been his counsel on a former occasion, and knew him well, his friend and adviser went to Mr. Pollock, who testifies that he did not know that Mr. Brown was a resident of this state.

It is also shown that the respondent had no case here in court, and no professional business to transact, and yet he made his application here on the 28th of May, and went immediately home to Kittanning, and was there admitted on the 6th of June, on his certificate from this court.

The whole evidence shows conclusively that both the committee and the court acted under an entire misapprehension of the facts. Had the court suspected for a moment that the respondent was a citizen of Armstrong county, we would have said to him, go and present your certificates to your own court first, and if admitted there, we will consider your claims afterwards. We would not have entertained his application for a single moment. And this misapprehension was caused by the conduct of the respondent in presenting his certificates, and withholding from the committee and the court the knowledge of the facts in regard to his residence and past history. Laboring under this want of information, which was in the power of the respondent, and which it was his duty to give, the court was induced to do an act which it would not otherwise have done. In all such cases the court will, and ought to, rectify the mistake, whenever it is in its power to do so.

The fact that the residence of Mr. Brown is noted on our minutes does not alter the case, because the clerk states that he received that information from some person after the party was admitted, and it is very certain that fact was unknown to the court until disclosed on the argument of this rule.

This rule must be made absolute on the ground that the court, in admitting James E. Brown, acted under an entire misapprehension of the facts.

And now to wit, June 30th, 1860, it is ordered and adjudged that the name of James E. Brown be stricken from the roll of attorneys of this court.

*In the District Court of Allegheny County.*

## EX PARTE DONAGHEY.

(Vol. VIII., p. 9. 1860.)

1. To authorize the issue of a warrant for the arrest of an alleged fugitive from justice from another state, it must be made to appear, 1. That defendant has committed a crime in the said state, 2. That he has been there duly charged with its commission, and 3. That he has fled from justice from the said state, and is found within this state.
2. It is the duty of magistrates, upon proper evidence, to cause fugitives from justice from either of the United States to be arrested and detained, in order to their surrender, before a requisition is actually made for their surrender by the executive of the state from which they fled.

*Thomas Howard and John W. Riddell, for the prisoner.*

*Thomas M. Marshall and Thomas F. Wilson, contra.*

The following opinion was delivered, July 20, 1860, by

WILLIAMS, A. J.—This is a writ of *habeas corpus*, directed to the sheriff and jailor of the county of Allegheny and the mayor of the city of Pittsburgh, commanding them to bring up William Donaghey, alleged to be in their custody, and to exhibit the cause of his detention. It appears from the return to the writ that the said William Donaghey was arrested and committed for further hearing, by the mayor, to the custody of the sheriff and jailor, on an information made before him by M. L. Alexander, on the 12th of May, 1860, alleging that "William Donaghey is a fugitive from justice from the state of Tennessee, of the county of Davidson, on a charge of obtaining goods under false pretence, and is now in the city of Pittsburgh."

Are the facts stated in the information sufficient to justify the arrest and detention of the prisoner for further hearing? If they are, he must be remanded, if not, he is entitled to be discharged. The Constitution of the United States, article IV., sec. 2, provides that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive author-

ity of the same state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

In furtherance of this provision, the Act of Congress of February 12, 1793, was passed, which provides that "whenever the executive authority of any state in the Union, or of either of the territories north, west or south of the river Ohio, shall demand any person as a fugitive from justice, of the executive authority of any such state or territory to which such person shall have fled, and shall moreover produce the copy of an indictment found, or an affidavit made before the magistrate of any state or territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear, &c."

Under the provisions of this act, in order to give the executive authority of any state or territory jurisdiction in such a case, three things are requisite: 1. The fugitive must be demanded by the executive of the state or territory from which he fled. 2. A copy of an indictment found, or an affidavit made before a magistrate, charging the fugitive with having committed the crime. 3. Such copy of the indictment or affidavit must be certified as authentic by the executive. If these prerequisites are complied with, the warrant for the arrest of the fugitive may be properly issued by the executive; not otherwise: 9 Wend. 219. But, though the executive has no authority to arrest and deliver up any person as a fugitive from justice unless these prerequisites have been complied with, still the principle appears to be recognised in this and some other states, where there is no statutory provision authorizing it, that in order to accomplish what is intended by the Constitution and the Act of Congress, it is the duty of magistrates, upon proper evidence, to cause fugitives from justice from either of the United States to be arrested and

detained, in order to their surrender, before a requisition is actually made for their surrender by the executive of the state from which they fled: Commonwealth, at the instance of Short, *v. Deacon*, 10 S. & R. 126; *In re Fetter*, 3 Zabriskie 311; *The State v. Buzine*, 4 Harring. 572.

In New York there is a statutory provision authorizing the arrest and detention of fugitives from justice from other states and territories of the United States (Laws of 1839, ch. 350, p. 323), by which the same officers who by law are clothed with the duty of causing offenders to be arrested, are empowered to issue process for the apprehension of a person charged in any such state or territory with treason, felony or other crime, who shall flee from justice and be found within that state. The act provides, that if from the examination of the person charged, &c., it shall satisfactorily appear that such person has committed a criminal offence, and is a fugitive from justice, the magistrate is to commit him to jail, to await the requisition of the governor of the state in which such fugitive committed the offence, &c.

Under the provisions of this statute, it has been ruled that before a magistrate proceeds to issue his warrant for the arrest of a fugitive from justice from another state, there must be a complaint taken on oath before such magistrate, and it must show three things, viz.: 1. That a crime has been committed. 2. That the accused has been charged in the foreign state with the commission of such crime. 3. That he has fled from justice, and is found within the state: *In the Matter of Heyward*, 1 Sandf. 701.

"As to the first of these propositions," Sandford, J., says, "the crime must have been committed in the foreign state. This is self-evident from the nature and object of the proceeding, as well as from the express language of the act. The same was held in a like case in Illinois, in *Ex parte Smith*, before Pope, United States District Judge, reported in 6 Law Reporter 57. Now this affidavit does not allege that the crime was committed in the state of Pennsylvania. It states that the prisoner stands charged in that state with felony, viz.: with obtaining property under false and fraudulent pretences; that is to say, a charge has been made there to the effect stated; not that he had there

committed the crime alleged. The persons defrauded reside in Pennsylvania, but it does not follow that the act was done there. This is a vital point in acquiring jurisdiction, and it is not contained in the affidavit. It is a possible inference from what is stated; but all that is stated may be true, and the offence nevertheless have been committed here. Indeed, the crime itself is questionably stated. There is no direct averment that it is a felony or a crime."

And in regard to the third proposition, he says: "The third matter which must be shown to the magistrate is that the accused has fled from justice, and is found here. This means that he has fled from the foreign state, or else it would be senseless; and to gain jurisdiction this fact must appear in the complaint. Now in this case there is not an allegation but what is perfectly consistent with the fact that the prisoner was in the city in October last, when the offence is said to have been committed, and that he has been here ever since. That he is a fugitive from justice from Pennsylvania, is no allegation that he has fled from there. It may lead to an inference, but to nothing more; and process like this is not to be founded on inferences. On this point, *Ex parte Smith*, above cited, is parallel; and although not binding as authority, is entitled to great respect from the intrinsic good sense of the decision. Thus there are two fatal defects in the affidavit before me, and I cannot help seeing that there was not sufficient to give the police justice jurisdiction to issue the warrant, or to commit the prisoner for examination."

Now let us test the information upon which the warrant for the arrest of the prisoner in this case was issued, by the principles laid in the case which I have just quoted.

1. Does it appear that a crime has been committed by the defendant in the state of Tennessee? This is nowhere averred in the information. It is not even alleged that he is charged with having obtained goods in the state of Tennessee under false pretences. From anything that appears in the affidavit he may have obtained the goods here from a citizen of that state, and so may have committed no crime there. If he obtained goods by false pretences in Tennessee, when, where, and from whom did he obtain them? If neither of these facts is stated in the affidavit,



how does it appear that a crime has been committed in the state of Tennessee? The affidavit is clearly defective in not setting out the fact that the goods were obtained in that state.

2. Does it appear that the prisoner has been charged in Tennessee with the commission of a crime? There is no direct averment that the obtaining of goods by false pretences is a felony or crime by the laws of Tennessee. But waiving this, it does not appear from the information that an indictment has been found against the prisoner, or that an affidavit has been made before a magistrate of Tennessee, charging him with having obtained goods by false pretences, and unless such an indictment has been found, or affidavit made, the executive of Tennessee would not be authorized to demand, nor would the executive of this state be justified in delivering up the prisoner. The information is, therefore, defective, in not alleging that the charge of obtaining goods on false pretences was made on an affidavit taken before a magistrate of the state. A charge not made on oath would not justify the surrender of the prisoner upon a requisition made by the governor.

3. Does it appear that the prisoner has fled from justice from the state of Tennessee, and is found within this state.

That he is a fugitive from justice from the state of Tennessee, is no allegation, according to the opinion of Judge Sandford, in Heyward's case, that he has fled from that state.

But it may be said that the strictness required in that case was owing to the fact that the proceedings were under the New York statute. But why should more strictness be observed in the form of the proceedings for the arrest of a supposed fugitive from justice from another state, where authority is expressly given by statute to a magistrate to issue a warrant for his apprehension and commitment to await a requisition, than where the authority to arrest is not given by statute, but is founded on practice sanctioned by judicial approbation?

Does the New York statute require anything to be shown in order to justify a warrant for the arrest of a fugitive from justice, not required by the Act of Congress in order to justify his arrest and delivery upon requisition of the governor of the state from which he fled? Or is the liberty of the citizen esteemed of less value in Pennsylvania than it is in New York? If not, why

should not the same strictness in the form of the proceedings be required? True, it is said by Mr. Justice Lewis, in his treatise on Criminal Law, p. 260, that "in Pennsylvania it is not necessary, in order to arrest a fugitive, that a requisition should be produced from the governor at the time of the arrest. If the oath on which a warrant issues is sufficient to raise a good reason for believing that the party charged has committed a crime in a sister state, it is the duty of the magistrate to commit the accused till time be given to take the legal steps for demanding a surrender." For which he cites as authority the case of *The Commonwealth v. Fassit*, Vaux's Cases 32. I have not that authority at hand, and am not advised what the facts in that case were. But how can it be supposed that "the oath on which the warrant in this case issued is sufficient to raise a good reason for believing that the party charged has committed a crime" in the state of Tennessee, when the information does not allege that he obtained any goods in that state by false pretences?—or that he is charged on oath with having obtained any goods in that state by false pretences? The defect in the information is not supplied by the affidavit of the mayor, who, in addition to the facts stated in the return to the writ, swears "that immediately prior to his issuing his warrant for the arrest of William Donaghey, on the oath of M. L. Alexander, said Alexander exhibited to this deponent a requisition from the governor of the state of Tennessee requiring the rendition of the body of the said William Donaghey as a fugitive from justice from said state"—because it does not appear from the affidavit that the requisition contained the copy of an indictment found, or an affidavit made before a magistrate of the said state, charging the said William Donaghey with having obtained goods under false pretences, or with the commission of any crime in the said state. Without the copy of such an indictment or affidavit so made, the requisition would be worthless, as it would give no authority to issue a warrant of arrest. And it is possible that it is owing to this defect in the requisition that no warrant has been issued by the governor, for the arrest of the prisoner as a fugitive from justice. But whether this is so or not, it nowhere appears in the information upon which the warrant was issued, or in the affidavit of the mayor,

that the prisoner has obtained goods in the state of Tennessee by false pretences, or that he has been charged, in the mode prescribed by the Act of Congress, with having obtained goods in that state by false pretences, or with the commission of any other crime. The prisoner must therefore be discharged.

Jackson's Case, 2 P. L. J. 150; Morgan v. Reakirt, 6 Id. 228; Dow's Case, 6 Harris 37.

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*In the Common Pleas of Allegheny County.*

GROVE v. GROVE.

(Vol. VIII., p. 10. 1860.)

1. In a suit for divorce *a mensa et thoro*, and for alimony, for the alleged reason that respondent turned his wife, the petitioner, out of doors, the mode or manner of the particular act need not be set forth in the pleadings; but evidence of facts which amount to a virtual turning out, may be received under such allegation.
2. Nothing short of adultery, or some such heinous offence against her marriage vows, will work a forfeiture of the wife's right to return to her husband's house and take up her abode with him.
3. The husband's refusal to receive her back, where she has not forfeited her right to return, amounts to a virtual turning of her out, and makes him liable to a decree of divorce from bed and board and for alimony.

PETITION of Mary Grove for a divorce from bed and board, and for alimony, at No. 176, October Term, 1857.

The case is sufficiently stated in the opinion of the court.

*Jasper E. Brady* and *Thomas B. Hamilton*, for complainant.

*R. & S. Woods*, for respondent.

The opinion of the court was delivered July 14, 1860, by MELLON, A. J.—This is a petition for a divorce from bed and board, and for alimony. The petitioner alleges that her husband “did, on the 15th day of September, 1856, turn her out of doors, and forbid her ever again to enter his house.” The respondent denies this in his answer; and after the testimony is closed on both sides, and the commissioner had made his report,

and the cause was set down for hearing, a motion was made on behalf of the petitioner to be allowed to amend her petition, by alleging therein that she had offered to return to her husband, and he had refused to receive her. Upon the suggestion of the court, this application was held over to the general hearing and argument of the case.

The law makes the turning of the wife out of doors a sufficient cause of divorce of this kind; and if there was no evidence in the case of actual turning out, a nice question would arise, how specially the constructive turning out, which, in McDermott's Appeal, 8 W. & S. 251, is held to be a virtual turning of the wife out, must be set forth in her petition. There it is held that a refusal of the husband to receive his wife is a virtual turning her out of doors under the law. The general rule in regard to the written pleadings of the parties, is that the legal allegation must be stated, but not the evidence by which that allegation is supported; and by this rule, to state the circumstances which constituted the turning her out of doors, would be erroneous; but the Act of Assembly in regard to divorce *a vinculo*, requires the cause of complaint to be particularly and specially alleged. Whether the act under which this proceeding is instituted requires the same degree of particularity, we need not stop to inquire. The same reason for particularity may not exist in a proceeding which contemplates a reconciliation of the parties, and puts it in the husband's power at any time to supersede it by a proposition to receive the wife back. Moreover, the cause mentioned in the act, "the turning of the wife out of doors," is in itself particular and specific. The mode or manner of the particular act, it would not seem reasonable should be required to be set forth; and, therefore, the evidence of facts which amount to a virtual turning out might be received under such allegation. There might, indeed, be some reason for an allegation of surprise on the part of respondent, were this a jury trial; or in case the amendment put the case on different grounds, or admitted evidence which could not without the amendment be received, and which, if received on amended pleadings, the respondent could, if opportunity had been allowed him, successfully rebut; but here it appears evident that the amendment can do the respond-

ent no injustice, inasmuch as it accords with the evidence on both sides, and he asks for no further time or opportunity to explain or rebut the evidence thereby permitted to come in. In accordance with the spirit of our law in regard to amendments, even on jury trials, it seems to me the amendment might be allowed.

But we do not quite see the necessity of the amendment. We think the evidence establishes not only a virtual turning of the wife out of doors by refusing to let her come in, but also an actual, literal turning of her out. We can regard the scene related by Weaver, the carriage driver, as no less; and making allowance for any amount of exaggeration by this witness, yet, taking that transaction as related by the members of respondent's own family, it certainly amounted to a refusal to permit her to stay in the house—an ordering of her out. It is true that this was not on the 15th September, 1856, but it was after that date and before the commencement of this suit. Time is not required to be stated in pleading according to the fact, unless it is descriptive, which is not the case here. And it falls into the same category, in this respect, with the allegations of place, quantity, quality and value, &c.

We think, therefore, whether with or without the amendment, the petitioner has made out the material allegation of her case, "the turning her out of doors."

But the respondent's counsel insist that the petitioner was herself to blame; that the evidence shows misconduct on her part, and that this is sufficient to bar her of her claim. We will not investigate or decide on which side the fault lies. We think the case does not require it. We will try to determine the legal rights and liabilities of the parties under the state of facts as disclosed by the evidence. If the fault was in the respondent, and perhaps in part it is, and were her faults so great and her passions so violent as to render the respondent's life burthensome, and make it impossible for him to live with her or to permit her to live with him, still he might, under our present existing laws, be bound to support her, and that is all that is asked here.

But apart from this; the leading fact which stands out prominently in all the testimony and in all the conduct of the parties

and the arguments of their counsel is, that the respondent has repeatedly refused to permit the petitioner to come back to his house and take up her abode with him. That he still persists in this refusal, and that she has, repeatedly and in earnest tried to get back. There is nothing shown in the petitioner's character or conduct to forfeit her right to return to her husband's house. Nothing short of adultery, or some such heinous offence against her marriage vows, would work such forfeiture. When either proposes to repent and return, all those minor offences against good manners, or frailties of temper, must be forgiven and forgotten; the minor faults and follies of the one are generally compensated by the faults and follies of the other, as between husband and wife, or at least must be taken to be so compensated if the husband would avoid the legal consequences of a separation.

There may be cases where the temper and disposition of the husband or the wife, or of both, or the relations of the one or the other with the children of a former marriage, renders it prudent—even advisable that a separation should take place; and this appears to us to be a case of that nature. It is the old story of a quarrel between the step-mother and the step-daughter. Nothing has been shown as regards either the husband, the wife or these daughters to indicate any unusual degree of evil. They all appear to be moral and religious people, and none of them to possess more than the ordinary degree of perversity incident to humanity. Indeed their disagreement under the circumstances is rather natural than otherwise, and the respondent may enjoy more peace and comfort in persisting to refuse to receive the petitioner back, and may be justifiable in doing so; but in doing so, he cannot escape the legal consequence of contributing to her support.

And this brings us to the most difficult part of our task, viz., to determine what that allowance shall be. He has a fair salary at present, but that is of uncertain continuance from various causes. He has certain rents, but our experience of the net income derived from this kind of property, allowing for repairs, lost rents, taxes, insurance, expense of collection and the like, taking a series of years together, leads us not to put that kind of income at a very high figure. Then the husband has the offspring of a former marriage to support, and who, we might say,

have nearly equal claim upon him with his wife. Then he is in debt. Considering all these circumstances, we do not see our way to an allowance of so much as is claimed for petitioner, nor so little as is proposed by respondent's counsel. The petitioner has been in the receipt of a scant allowance for some time past, and must, therefore, be in straitened circumstances at present, and in need of something in hand. She must also have incurred considerable expense for counsel and the like in this proceeding. We would, therefore, allow her one hundred dollars now in hand, and fifty dollars to be paid to her quarterly hereafter, dating from the first day of July instant, until it is otherwise ordered by this court; leaving it open for a modification of the decree, which we shall make upon sufficient cause shown by either party.

*Decree.*—And now, July 14, 1860, this cause came on to be heard on libel, answer and testimony, and no issue of fact being asked for to be tried by a jury, and the whole matter being submitted to the court, upon the pleadings and evidence and arguments of the counsel respectively, and the court having given the case full consideration, do now order, adjudge and decree, that the said complainant, Mary Grove, and the respondent, Samuel Grove, be separated from bed and board.

And it is further ordered, adjudged and decreed, that the respondent pay to the complainant the sum of one hundred dollars now in hand, for her present necessary supplies and to defray her present liabilities and expenses, and the annual sum of two hundred dollars, from the 1st day of July instant, in quarterly payments of fifty dollars each, for her support and maintenance, until it is otherwise ordered by this court.

And it is further ordered, adjudged and decreed, that the said respondent, Samuel Grove, pay the cost of this proceeding.

Affirmed 1 Wright, 433; see notes to Pardon, ed. 1861, pp. 346, 347, 349.

*In the Supreme Court of Pennsylvania.*

## CUNNINGHAM'S APPEAL.

(Vol. VIII., p. 17. 1860.)

Where an administrator's account is referred to an auditor, who hears the parties and makes a report which is confirmed by the court, the parties are not entitled to a bill of review under the Act of 13th of October, 1840.

APPEAL from the Orphans' Court of Allegheny county.

John Kirkpatrick died leaving a widow and several minor children. John McClurg and Joseph Little became the administrators of his estate, and James Cunningham guardian of the minor children.

The administrators filed a final account, to which the guardian filed exceptions; and it was referred by the Orphans' Court to an auditor. The guardian appeared before the auditor, and was fully heard. The auditor filed his report in December, 1846, which was duly confirmed by the court.

In May, 1850, the guardian filed a bill of review, alleging that in the auditor's report on the final account of the administrators "there were gross mistakes which, if not corrected, would do great injustice to the minor children." To this bill the respondents demurred, taking the ground that the Act of the 13th of October, 1840, providing for a bill of review, was intended for the correction of errors in accounts that had passed the court without being contested, and not for the correction of errors in the reports of auditors.

On hearing, the Orphans' Court dismissed the bill, and the guardian appealed.

*Woods*, for appellant.

*McConnell* and *Marshall*, *contra*.

The opinion of the court was delivered at Pittsburgh, September 27, 1852, by

LOWRIE, J.—The administrators of John Kirkpatrick, deceased, filed a final account, and, on exceptions being taken to it, it was



referred by the Orphans' Court to an auditor, who reformed and corrected the account, and made a report to the court which was duly confirmed. To all this proceeding the present petitioner and appellant was a party in his character as guardian. The auditor's report is dated 20th December, 1846, and we presume that the confirmation of it was not long subsequent.

In May, 1850, the present appellant filed this bill of review, which on hearing was dismissed, and this was right.

The Act of the 13th October, 1840, Pamph. L. p. 1, does not apply to such a case. The law was not intended to apply to cases where the correctness of the account has been actually contested in court, where the parties have all been fully heard, and all the objections raised have been decided upon by the court. It may include accounts passed and confirmed without objection in the ordinary way, and very rightly, for, of these, parties have only constructive notice. But it would be a violation of the plainest legal principles to extend it to a case where the party complaining has had a full opportunity of being heard, where he alleges no surprise, no newly discovered facts, and no mistakes except some that are supposed to be manifest in the previous proceedings.

Decree affirmed with costs.

Parker's Appeal, 11 P. F. Smith 478 ; Kinter's Appeal, 12 Id. 318.

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*In the Orphans' Court of Allegheny County.*

RYAN'S ESTATE.

(Vol. VIII., p. 25. 1860.)

1. Inadequacy of price merely, in a judicial sale of any kind, is not sufficient of itself to justify the court in withholding its sanction and approval, unless that inadequacy is so gross as of itself to amount to proof of some latent irregularity, misapprehension or unfair practice.
2. If such irregularity, misapprehension, or unfair practice is shown *aliunde*, then the inadequacy of price, though slight, will be imputed to that cause, and then if the court is satisfied that the owner of the property or his creditors will be benefitted, the sale may be set aside, or the biddings opened and a re-sale ordered.
3. A misapprehension in the mind of heirs and administrators, in case of

an Orphans' Court sale, regarding the practice of the court as to setting aside sales for inadequacy of price, is such a misapprehension as is contemplated above.

THIS was an Orphans' Court sale, ordered for payment of debts. On the coming in of the report, objection was made on the ground of inadequacy of price merely. The court overruled this objection and confirmed the sales, whereupon the heir presented a petition praying a rehearing, and that the order of confirmation be rescinded and the property again exposed to sale on the ground not of inadequacy of price alone, but for such inadequacy induced by a misapprehension as to the practice of the court in setting aside sales for such cause. No deed being delivered or money paid the petition was entertained and filed, and an answer thereto put in by the purchaser, and testimony taken on both sides.

*A. S. Bell*, for the petitioner.

*David Reed*, for the purchaser.

The following opinion was delivered July, 1860, by

MELLON, A. J.—When this case came first before the court the objection to the sale was made and argued on the ground of inadequacy of price alone. It was no such inadequacy as would shock the conscience, or in itself amount to proof of mistake or unfair practice; the objection was therefore deemed insufficient and the sale confirmed. And after hearing the reargument, and carefully reconsidering the subject my mind remains unchanged on this part of the case. Inadequacy of price merely in a judicial sale of any kind, is not sufficient of itself, to justify the court in withholding its sanction and approval, unless that inadequacy is so gross as of itself to amount to proof of some latent irregularity, misapprehension, or unfair practice; or if such irregularity, misapprehension or unfair practice is shown, *aliunde*, then the inadequacy of price, though slight, will be imputed to that cause, and then if the court is satisfied that the owner of the property or his creditors will be benefited, the sale may be set aside, or the biddings opened and a resale ordered. These are the only two

aspects in which inadequacy of price can be made available as an objection.

No sooner, however, was the decision announced than a different ground was assumed, and we are anxiously and urgently entreated to reconsider the case. This new ground is the misapprehension of the heir and the administrators, in regard to the practice of the court as to setting aside such sales for inadequacy of price, and in consequence of which misapprehension certain bidders did not attend the sale, and the property did not bring as much as it otherwise would. A formal petition is now presented on the part of the heir, in which she avers, that she was prevented from attending the sale in person, by reason of the illness of one of her family, and that she was not represented there by either friend or attorney, as otherwise she would have been had no such representations been made to her by the administrator, viz., to the effect "that no difficulty could intervene to setting the sale aside if unsatisfactory." And she further avers, that she was "lulled into this false security solely by reason of the statement made to her to that effect by the administrator;" and, "that persons are still ready and willing to bid at least one thousand dollars more than the property was struck off at, and who would have attended the sale and bidden at least that amount more, only that, by reason of the facts aforesaid, she neither went to the sale herself nor requested their attendance on their own or her behalf." And to show her averments well founded in this respect, the stipulations of these responsible parties are produced on the argument and placed on file, stipulating upon a resale to bid a much higher amount than she avers in her petition. Nor are these averments positively denied by the purchaser in his answer, or successfully controverted by the testimony. A misapprehension does seem to have existed in the mind of at least one of the administrators, and with all the seeming evasion in his answers, he undoubtedly did lead the petitioner to rely upon the belief that if the sale should turn out to be unsatisfactory as to price, she had a remedy for it in court. If it was not the practice to set aside such sales on such objection, then no such remedy existed, as she was led to suppose, and she labored under a delusion in not procuring all the bidders she could to

attend the sale. Indeed, it would seem from the confident manner of the objection and argument on the former occasion, in regard to inadequacy of price, that the misapprehension as to its sufficiency as an objection to a sale, was not confined to the petitioner and administrators, but embraced a wider circle, including some of the profession. And by the stipulations for higher prices which are now presented, we cannot say, but for that misapprehension nearly two thousand dollars more might have been realized at the sale. As regards stipulations for higher prices, so frequently offered in such cases, they can, of course, have no other force or effect than as evidence on the question of adequacy of price. It is urged, and with truth and force, that the purchaser had nothing to do in inducing this misapprehension; that he has a vested interest in his bargain and should be protected in his rights. The purchaser's right or title is inchoate, not a perfect or vested right. It only becomes fixed or vested upon the final sanction and approval of the court and the execution and delivery of the papers and payment of the money. Before the bargain is thus consummated, the court has the power, for sufficient cause, to arrest the proceedings; even to impound the deed, if made out, but not delivered, and to rescind the sale and all preceding orders in regard to it. Such is the course of practice in relation to sheriffs' sales, and there is no difference in principle, in these respects, between the different kinds of judicial sales for the payment of debts.

It is to the advantage of all parties, however, and especially to those whose property is so exposed to sale, that the inchoate right of such purchasers should be duly respected, and bidders at such sales receive all proper encouragement. If there is no stability in the result of such biddings, and the sale is made to depend ultimately on the opinion of the owners or others as to the adequacy of the price, it is not likely bidders will take the trouble of proposing for such an uncertainty, and the result must be that no adequate price will be offered, until the biddings are transferred to the court in the shape of stipulations. Such result is to be avoided by the steady and uniform application of such rules and principles as will afford to bidders all the security which the nature of such sales can admit of; and such it ap-

pears to me are the principles in regard to price already adverted to. Where the price is so grossly inadequate as to shock the conscience, and amounts in itself to proof that some unfair practice, or fraud or misapprehension must have existed to produce it; or where the price is but slightly inadequate, but irregularity, misapprehension or fraud is shown independently, the sale in either case may be set aside, if in the opinion of the court it will conduce to the benefit of the owner of the property or his creditors. Under such circumstances no purchaser can justly complain of the loss of his speculation. In the case before us the purchaser, as is asserted, has held his hand-money all the time in readiness, a period of nearly two months. This is a hardship, and it is not without precedent to allow interest in such case, and if as to the purchaser of the Spring Hill farm the matter is to end here, it seems but just that he should be allowed interest on his hand-money, and the administrators take credit for it in their account. Remedies as well as rights ought to be mutual, and it should be remembered that the buyer as well as the seller has frequent occasion to apply to the court for relief; and too rigid a rule might be as prejudicial to the one class as to the other. The utmost vigilance will not always shield from the consequences of inadvertence and mistake. *Humanum est errare.* A case occurs to me wherein Judge Grier, when in the District Court of this county, relieved a purchaser who bid too much under a misapprehension as to the shape and location of the property, and although, by special attention to the description, or an inspection of the premises beforehand, he might have avoided the difficulty. And in a case where a first mortgage creditor bid the full value of the mortgaged premises, at a sale upon a junior judgment, under the misapprehension that the amount of his bid would be applicable to his own mortgage, the Supreme Court was of opinion that the court below ought to have relieved him from the consequences of his mistake by setting aside the sale. "The remedy of a purchaser," says Justice Bell, "who has bid at a sheriff's sale under a misapprehension as to his rights, is by application to the court to have the sale set aside; and in the exercise of a reasonable discretion the courts have

not been rigid in the application of the maxim of *caveat emptor*, to judicial sales, but have always liberally interfered for the protection of an erring purchaser untainted by fraud:" Crawford v. Boyer, 2 Harris 380. In the foregoing case too, it will be observed, the relief granted was for mistake of law which ordinarily is not relievable against in equity. According to Justice Huston, however, Rhodes v. Frick, 6 Watts 317, all legal rules and principles must conform to the nature of man, who, whatever theorists and speculative philosophers may dream to the contrary, can never be brought to act at all times according to any one given rule. And according to Chief Justice Gibson, M'Clure v. Foreman, 4 W. & S. 280, "it is the duty of the judge to develop the pre-existent principle of the immutable laws of right and wrong, capable of infinite extension and adaptation to every complication of circumstances. It would be as pernicious to clothe the judiciary with arbitrary discretion, as it would be impracticable to confine the streams of justice to the limits of a code, or make them flow the more freely for being ice-bound. All that can be done is to allow the court to adjust the parts, by loosening a pivot in one place, and tightening a screw in another, to make the whole work according to the design of the legislator."

In the case under consideration, however, we need no resort to arbitrary discretion, as we think we are guided to a correct decision by the landmarks of well known and established principles; and if compelled to resort to discretion, unaided by established principles, we could not feel satisfied that we were in the exercise of a reasonable discretion, if we refused to set aside such sale, when a misapprehension appears to have occasioned a depreciation of prices and consequent loss to the estate of nearly two thousand dollars. The proper administration of the estates of decedents, when the vigilance and care, which in most instances acquired the property, no longer remains to watch over and protect it, is a sacred duty of the Orphans' Court. Everything prejudicial to such estates should be vigilantly avoided, and perhaps even a more liberal exercise of discretion to prevent them from loss might be exercised, than in other cases where the parties are more capable of watching over and protecting their own

interests, but as we do not assume, we need not therefore explore any *terra incognita*.

These sales must therefore be set aside.

Haslage's Appeal, 1 Wright 440; Hay's Appeal, 1 P. F. Smith 58; Dundas's Appeal, 14 P. F. Smith 325.

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*In the Quarter Sessions of Allegheny County.*

ROAD IN PLUM TOWNSHIP.

(Vol. VIII., p. 41. 1860.)

1. Road viewers should apply to every owner of land on the designated route for a release, and if it is refused, should consider the damages and advantages likely to result to him from the opening of the road, and if the former predominate, should assess the excess of damages and make report thereof.
2. If the owner refuses to release, the viewers cannot refuse to hear his proofs and allegations, and to consider his claim for damages, if he makes any; but if heard or without being heard his claim is considered and decided adversely, his remedy is not by exceptions to the report or by testimony in court, but by application for a review.
3. If by a mistake of duty or by oversight the viewers should neglect to apply for a release, or should refuse to hear or consider, or should overlook a claim for damages, and this be made to appear by affidavit or otherwise to the court, the mistake may be rectified by referring the report back to the same viewers for correction.
4. It is not requisite that each application for a release or decision against a claim for damages be made to appear on the face of the report or in the releases or otherwise. The viewers are only required to return such releases as they obtain and to report such damages as they assess. As to the rest it is presumed they did their duty in the premises, and the burden of showing the contrary devolves upon exceptants.
5. Where neither the report nor draft shows the improvements on the land, or the fact, where it exists, that there are no improvements, and exceptions thereto are taken, the court will refer the report back to the same viewers to consider and report upon the matter suggested by the exceptions.
6. A remonstrance can have no weight with the court except where the reports of viewers and reviewers or re-reviewers conflict and leave the duty of the court uncertain.

THE viewers in this case reported favorably to the road, and located it on the ground, and returned a draft of its location,

showing its courses and distances, and the names of the owners of the land, over which it is to pass.

To this report Mr. Sands, one of the landowners, through whose land it passes, files the following exceptions:

1. No damages are allowed him.
2. No mention is made of improvements.

Mr. *Moffit*, for the exceptant.

Mr. *John Mellon*, for the road.

The opinion of the court was delivered, July, 1860, by

MELLON, A. J.—A release of damages is attached to the report, signed by all the landowners except Mr. Sands. No mention is made of any application to him for a release, and there is nothing in the report or otherwise to show that the subject of damages, as to him, was taken into consideration. Neither is there any noting or marks, or references on the draft, or elsewhere to indicate the existence of any improvements, unless the owners' names may be taken to indicate that the lands are not unseated, and, therefore, in some degree improved. It is the duty of the viewers to apply to every owner for a release, and if it is refused, and it appears that damages will be sustained it is their duty to assess and make report thereof. In such assessment they are to take into consideration the advantages likely to result to the owner from the opening of the road, and these advantages may be sufficient fully to compensate the damages. If the owner refuses to release, the viewers cannot refuse to hear his proofs and allegations, and to consider his claim, if he makes any, but if heard or without being heard his claim is considered and decided adversely, his remedy is not by exceptions to the report or by testimony in court, but by an application for a review: *Ewings' Mill Road*, 10 Casey 418. If by a mistake of duty or by oversight, the viewers should neglect to apply for a release, or should refuse to hear or consider, or should overlook a claim for damages, and this were made to appear by affidavit or otherwise to the court, the mistake might be rectified by referring the report back to the same viewers for correction.

It is contended here, however, not that the viewers refused to



hear or consider the claim of Mr. Sands, but that it must appear on the face of the report or in the releases, or otherwise that he was applied to for a release, and that his claim for damages was considered. This is not required by the provisions of the act. The viewers, according to the act, are only required to return such releases as they obtain, and to report such damages as they assess. Neither the application for the release, nor the refusal to give it, nor the decision of the viewers against a claim for damages, are required to be reported by any express provision of the act. The legitimate inference, therefore, in pursuance of the maxim *omnia præsumuntur rite acta*, is that the viewers did their duty in the premises, and the burden of showing the contrary devolves upon the exceptant. This view of the case is sustained by the following authorities: Point no Point Road, 2 S. & R. 277; M'Connell's Mill Road, 8 Casey 285; Ewings' Mill Road, 10 Id. 418.

As to the improvements, however, there is more difficulty. The act positively requires upon the draft a "brief noting of the improvements through which the road may pass." I do not see how this can be dispensed with in a case like the present, where the mention of numerous owners indicates that the route is not through wild or unseated lands. The requisition of the act has been so far relaxed as allow a noting of the improvements in the report itself to supply the want of it on the draft, and in one or two cases an intimation is thrown out that the only inference to be drawn from such omissions is that no improvements existed. The weight of authority, however, seems to be in favor of requiring the report or draft to show whether or not the lands are improved. The designation of improvements often conveys useful information to the court, and was required for wise purposes, and an express provision of the kind should not be set aside by construction. In the case of conflicting reports of viewers and reviewers, and in questions of damages, the court should know something of the improvements on the route of the proposed road. Roads are to be located so as to do the least damage to private property; and according to Chief Justice Tilghman, 13 S. & R. 446, "a road may be useful, and yet the injury done to the individuals, through whose grounds it passes, may be so

great, and the probable damages to be paid by the public so high that upon the whole it would be inexpedient to open it." In the same case the direction of the act as to improvements, was regarded as essential and mandatory. And in the case where the contrary doctrine was first broached, the question was not fully considered, the court remarking that the exigencies of the case did not require it, as the words "no improvements" were written across the face of the draft, and in 11 Harris 304, it is doubted whether giving the names of the owners on the face of the report is a sufficient "noting of improvements," but it was held to be such an error as could be corrected in the court below, by referring the case back to the viewers.

Neither of the exceptions taken in this case go to the merits or strike at the existence of the road. There is nothing in either to indicate that the road is unnecessary, or that the viewers have violated or omitted their duty in any vitally important particular, and the rule in such case is to refer the report back to the same viewers to consider and report upon the matter suggested by the exceptions; and this, in regard to the exception on the subject of improvements, would end all that need be said here, but for another matter which has been brought before us, and which is of so frequent occurrence in these cases as to require notice. We have reference to the presentation of remonstrances.

A strong and numerous signed remonstrance is presented against this road. The frequency of these remonstrances would indicate a prevailing belief that such is a regular and efficient mode of procedure, and that by a remonstrance at any stage of the case, the action of the court may be influenced. This is a mistake. Where there is nothing but the report of viewers, or where the reports of viewers and reviewers are to the same effect, there is no place whatever for a remonstrance. It is only where the conflicting reports of viewers and reviewers, or re-reviewers, leave the duty of the court uncertain, that recourse can be had to remonstrances or counter petitions, or depositions for information. The law prescribes the channel through which the court shall derive its information, viz., by reports of viewers and reviewers, and until the supply to be afforded by these channels is

exhausted, we are not at liberty to go elsewhere. Viewers and reviewers are the legitimate agents appointed to give the court the best information on the subject. They are presumed to be fair and impartial men, of good judgment in such matters. They view the ground, and are bound to hear and consider all that the parties interested have to say, and to give their opinion on the subject to the court in the shape of a report and under the solemnity of an oath; and lest one set of viewers should be mistaken in judgment or misinformed, or should happen to be partial in their opinions, the law is so careful that all parties shall have fair play, that it gives those who may be dissatisfied with a report of viewers the right to have an equal number of other men appointed in their stead, to review and reconsider the whole subject-matter, and to report in like manner their opinion to the court. It is easily seen how much more safe and reliable information so derived must be, compared with information afforded by remonstrance. A remonstrance, in most instances, expresses nothing but the views of some one interested party by whom it is prepared, and is signed by others frequently to avoid displeasure and importunity, and without knowing or caring much about the merits of the subject.

The legitimate sources of information must first be exhausted, and if in the end the matter remains doubtful, it is time enough then to look elsewhere; but whilst the battle is regular and the ranks unbroken, the combatants must use the prescribed weapons. It is only when they come to such close quarters that the regular weapons are of no more use, that they are allowed to fight with whatever else comes to hand.

Where, as in the present case, the evidence prescribed by the law to guide the action of the court is all one way, a remonstrance is altogether out of place and can have no effect.

The report is referred back to the viewers upon the matter raised in the second exception.

See notes to Purdon, ed. 1861, p. 884.

*In the Supreme Court of Pennsylvania.*McANNALLY, FOR USE, &C., v. SOMERSET COUNTY MUTUAL  
INSURANCE COMPANY.

(Vol. VIII., p. 43. 1860.)

1. Where the provision of a policy of insurance was that "if any change be made as to the tenants or occupancy of the premises without being notified to the company and endorsed upon the policy, then this instrument to be void:" Held, that if the persons who occupied the premises at the time of the execution of the policy, left a short time before the fire, leaving them unoccupied at the time of the fire, it was not necessary that the assured should have given the company notice that the tenant had left, in order to hold the company liable.

## ERROR to the Common Pleas of Somerset county.

The opinion of the court was delivered by

STRONG, J.—The controversy in this case arises out of a provision in the application which, by the policy, is declared to be a part thereof. The provision is as follows: "but if any untrue answer has been given to the foregoing interrogatories, whereby the said company have been deceived as to the character of the risk, or if any change be made as to the tenants or occupancy of the premises without being notified to this company and endorsed upon their policy, then this instrument to be void and the policy of no effect."

The fire took place on the 20th of April, 1857, and at that time the property insured was untenanted. The person who had occupied it had left a short time before, how long does not appear, and no new tenant had taken his place. The court below was of opinion that this amounted to a change "as to the tenants or occupancy," within the meaning of the policy, and instructed the jury that no evidence of notice of the change had been given. The jury were, therefore, directed to return a verdict in favor of the insurers. Herein we think there was error.

If a failure to give notice to the company that the tenant had left the premises could be held to be a breach of the conditions

of the policy, and if it rendered the policy of no effect, still the court was mistaken in withdrawing from the jury the question whether notice had not in fact been given. There was evidence from which they might well infer it. E. W. Hall, one of the witnesses, testified that at the time of the arbitration, Hicks, who was the secretary of the company, "admitted that the plaintiff had given notice at one time, at Fichtner's, that the tenant had left the house." Another witness proved that "there was a controversy between McAnnally and Hicks as to the place where he was notified about the tenant's leaving; that Hicks admitted he was notified at one place, but which one he could not state." The testimony of a third witness was, that after the fire Hicks expressed to McAnnally regret for the loss, and promised to try and give him the money when the loss should be appraised. No complaint was made of any default on the part of the assured. Surely, from all this the jury might have presumed that notice had been given before the fire had occurred. Yet the court withdrew the question entirely, holding that there was no evidence at all of such notice. This, however, is of comparatively small importance, for we are of opinion that McAnnally was not bound to give any notice that the tenant had left, in order to hold the company liable. A mere surrender by one tenant without the entry of another, is not a change "as to the tenants or occupancy of the premises," within the meaning of the policy. To give it such a construction would be unreasonable. Then it would demand that if a tenant went out and resumed his tenancy after two days' absence, notice should be given of his going out, and a second notice of his return. A change of tenancy or occupancy is a substitution of one tenant or occupant for another. A change in the nature of the occupation was provided for in another part of this policy, and all that the provision now under consideration means is, that if a new occupant comes in, instead of the former, notice of the fact shall be given to the company. If the insurers had intended to secure relief from liability in case the premises should be left temporarily vacant without notice to them, it would have been easy to find words to express such intention. No such intention is fairly deducible from the words which they have used.

It follows that the court erred in the construction they gave the policy and in directing the jury to find for the defendant.

Judgment reversed and a *venire de novo* awarded.

See *Hill v. The Insurance Company*, 9 P. F. Smith 474.

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*In the District Court of Allegheny County.*

PETERSON v. KIER.

(Vol. VIII., p. 65. 1860.)

1. Where a lessee under his authority to bore salt wells, brings oil to the surface, the oil belongs to the owner of the soil.
2. The lessee is not bound to collect and keep the oil for the owner, he may let it run to waste, but if he does collect it and appropriate it for his own benefit, he is liable therefore, and trover will lie to recover its value.

THE facts of this case are fully detailed *infra*.

A. W. Loomis, for the plaintiff.

Hamilton and Acheson, *contra*.

The following opinion of the court on the questions of law reserved, was delivered, Sept. 1, 1860, by

HAMPTON, P. J.—This was an action of trover to recover the value of a large quantity of petroleum, sold and converted to his own use by the defendant, which the plaintiff alleged belonged to him.

The plaintiff being the owner of a body of land on the Allegheny river containing salt water, entered into the following agreement with Thomas Kier and Samuel M. Kier, on the 30th day of October, 1837, viz:

“Article of agreement made and concluded this thirtieth day of October, in the year of our Lord one thousand eight hundred and thirty-seven, by and between Lewis Peterson, of the city of

Pittsburgh, of the one part and Thomas Kier and Samuel M. Kier of the other part, witnesseth that the said Lewis Peterson for and in consideration of the covenants hereinafter mentioned to be kept and performed by the said Thomas Kier and Samuel M. Kier, and their assigns doth lease unto the said Thomas Kier and Samuel M. Kier and their assigns a certain lot or piece of ground owned by the said Lewis Peterson, lying and being in the county of Allegheny, and adjoining the Pennsylvania canal." (Here follow the boundaries, which it is admitted, contain some three or four acres.) "With the privilege on the above described premises to bore salt wells and erect all manner of buildings, necessary or useful in the prosecution of the manufacture of salt, and to use all coal in said hill, in the rear of the above described premises, within the boundary line of said Peterson's land, that may be necessary and proper to the successful prosecution of said manufacture, together with the right of taking, from the before described premises, timber and stone to erect and keep in repair the establishment herein contemplated. It is hereby agreed that said Peterson shall be at liberty to lay a railroad near Humes' line, from the coal bank in the hill to the canal, provided it do not interfere with the interests of said lessees in the conducting of their works and improvements. It is further agreed that the lease shall endure as long as the salt well herein contemplated to be established shall be carried on by the said Thomas Kier and Samuel M. Kier, the survivor of them or by their assigns, provided that if the said parties of the second part shall let the salt wells, erected on said premises, remain idle or out of use for three continuous years, then the said Peterson shall be at liberty to enter upon possession of said premises as if this lease had never been entered into. Should the said parties of the second part be induced at any time to abandon their works and improvements, they shall be at liberty to remove from the premises all machinery and fixtures except houses and buildings connected with the manufacture of the salt, and it is further agreed that the salt wells about to be established shall be in operation within one year from the date of this article, and if delayed for two years from the date of this article, then the said Peterson to take possession of the premises as before described.

"In consideration of which the said Thomas Kier and Samuel M. Kier agree to pay unto the said Lewis Peterson the one-twelfth barrel of all the salt made on said premises, to be delivered to the said Lewis Peterson or his authorized agent at the works on the said premises, on the the first day of January, April, July and October in each and every year during the continuance of this lease. Witness our hands and seals the day and year first above named."

This agreement was signed and sealed by the parties respectively.

The lessees went into possession, bored a salt well in 1839, erected works and manufactured salt until about 1845, when this oil began to be brought up in small quantities with the salt water by the ordinary operations of the pump; and as a singular fact, it is worthy of notice, that it began to make its appearance about the same time in two or three other salt wells in that neighborhood.

At first it was regarded not only as an article of no value, but as a great obstruction in the manufacture of salt; because, unless separated from the water, it injured the salt, and consequently they were obliged to pump the water and oil together into large cisterns or basins, and let it remain there several days until the oil, by its specific levity, rose to the surface, when it was conducted, at first into the canal and covered its surface for several rods, when it was set on fire and burned for a number of days. It increased in quantity from year to year, for several years until it yielded on an average about — barrels every twenty-four hours. The defendant, who survived his father, finally determined to make an effort to introduce it to the public as an article of merchandise. He entered into a contract with the plaintiff for the purchase of all the oil that came out of his well also, which was situated a short distance from his own. The oil had made its appearance there before it had done in the defendant's well, and had been treated in the same way. The defendant then adopted vigorous means, by advertising extensively, and employing agents in various quarters to bring this article before the public. After the first contract with the plaintiff had expired by its own limitation, another was entered into at increased rates, and things moved on prosperously, for the plaintiff at least, down to



the period of bringing this suit. In regard to the defendant, while the plaintiff alleges he has derived large profits from this traffic, he asserts he has lost largely by reason of his heavy expenses incurred in advertising and the other means resorted to in order to establish its value in the estimation of the community. That question, however, is not material here, although it might be, perhaps, in another form of proceeding.

It was shown conclusively on the trial, that the salt water could not be procured, without at the same time and by the same operation bringing up to the surface the oil with it. An attempt was made by the plaintiff to prove that special efforts were employed by the defendant to increase the quantity of the oil by perforating the tubes; but this proof was so slight, and was so completely met and overthrown by the rebutting testimony of the defendant, that it was not deemed necessary to submit it to the jury, more especially as we were anxious, on account of the magnitude of the main question involved, to present it unembarrassed by minor points for the determination of the Supreme Court.

An effort was also made to prove that the plaintiff advised the defendant to barrel up this oil and send it to market. But the whole of the evidence on this point consisted in a few words of a conversation casually overheard by one of the hands employed about the works, who happened to come where the parties were standing and conversing together, to make some inquiry of his employer about his works, and then went away. This evidence seemed so slight, and unreliable, that it was treated as the other had been, and for the same reason.

The counsel agreed upon the amount of the verdict, in case the plaintiff was entitled to recover at all in this form of action, and the jury were directed to find for the plaintiff, subject to the opinion of the court on the questions of law presented by the defendant's counsel as embraced in his 1st, 2d, 3d, 4th and 7th points, which were reserved.

The law on which this case rests may be embraced in two questions, viz:

1st. Whether the oil in controversy, when brought to the mouth of the well, belonged to the plaintiff or the defendant?

2d. If it was the property of the plaintiff, will the action of trover lie for its value?

The plaintiff's counsel contends that inasmuch as the existence of this oil was not known to either of the parties at the date of the lease, it could not have formed any part of the consideration of the contract, and was not embraced within either its letter or spirit; and, therefore, as the defendant has converted to his own use what the plaintiff never sold, and the defendant never purchased, he is liable in this action for its value.

The defendant's counsel contends:

1st. That the lessees were tenants for life, and that this oil was a mere incident to their life estate, and

2d. That the oil was no part of the realty, but flowed through the earth, and belonged to them as much as the light of the sun, or the air they breathed. That even if it did belong to the freehold, they had a right to sever it in the ordinary operation of pumping up the salt water, and as no waste was committed thereby, this action cannot be maintained.

The first question to be considered is whether the oil in controversy, was the property of the plaintiff or defendant?

The importance of this question to these parties is greatly enhanced by the fact that the lease may continue during the life of the defendant, who is yet comparatively a young man. Its determination may also involve principles affecting other cases of immense magnitude.

The plaintiff being the owner of the fee, the defendant's claim to this property is to be determined by his rights under the lease, which must be construed like all other contracts, by the true intent and meaning of the parties thereto. In order to determine what their intention was, we must place ourselves in their situation and circumstances. It does not appear that the few acres of land leased was of any value for any other purpose than the manufacture of salt. The lessees desired to engage in that business, and the lessor was willing to grant them all necessary facilities. This was undoubtedly the object, and the only one in the minds of both the parties. With that in view they enter into the agreement, in which it may be fairly presumed their respective rights and privileges were clearly set forth and de-

fined. What rights and privileges, then, are granted by this lease to the defendant?

The lessees were to have "the privilege on the above described premises to bore salt wells and erect all manner of buildings necessary or useful in the prosecution of the manufacture of salt, and to use all coal in said hill in the rear of the above described premises, within the boundary line of said Peterson's land, that may be necessary and proper to the successful prosecution of said manufacture, together with the right of taking from the before described premises, timber and stone to erect and keep in repair the establishment herein contemplated."

It was further agreed that the lease should continue as long as the salt well should be carried on by the lessees, or the survivor of them, or by their assigns, provided that if the salt works should be suffered to remain idle for three continuous years, or if the salt wells contemplated should not be put in operation within two years from the date of the lease, then Peterson was at liberty to enter and take possession of the demised premises, "as if this lease had never been entered into." In consideration of these privileges, the lessees agreed "to pay to Lewis Peterson the one-twelfth barrel of all the salt made on said premises," to be delivered at the works on the first day of January, April, July and October of each year during the continuance of the lease. In case the lessees should abandon the works, they were at liberty to take away or remove from the premises, all machinery and fixtures, except houses and buildings connected with the manufacture of salt. These are the privileges granted by the lease, for which the lessees were to give the twelfth barrel of the salt manufactured.

It is very clear that the only object which the parties had in view, and that which constituted the entire consideration of the contract, was the manufacture of salt. The existence of the lease depended on the lessees putting the works into operation within two years, and not suffering them at any period to remain idle for three successive years. The lessees were entitled to all necessary privileges and facilities in boring wells and operating their works. They had a right to sink their wells as deep as was necessary to procure an abundant supply of water, and in

doing so, to bring to the surface all minerals of every description that lay in their way. They also had a right, in pumping salt water to bring up every other liquid mixed therewith. Consequently they had the right to bring up this oil by the ordinary mode of pumping their salt water. This will be readily conceded by all. In mining for coal, or quarrying stone for operating or constructing their works, they had a right to sever and remove out of their way all earth, clay, gravel, slate, gold, silver, iron ore, or other minerals that might obstruct or hinder their necessary operations. In all this the lessees were guilty of no waste, destruction, or diminution of the freehold. It is plain also, that the lessees were not bound, at their own expense, to put into barrels, or otherwise preserve the oil, when thus brought to the well's mouth, for the benefit of the plaintiff, for that was no part of their bargain. They might have continued to cast it off as they did at first without rendering themselves liable to the plaintiff for its value, even if it were the property of the latter, especially if he had refused after notice to take it away: *Forster v. The Juniata Bridge Co.*, 4 Harris 393.

It is said this oil forms no part of the realty, but flows through the earth, and like the air or light on its surface, any one who pleases may appropriate it to his own use. It may be true, and very probably is so, that it flows in veins through the earth, originating we know not where, and going we know not whither. Whether it is generated within the limits of the plaintiff's land, and if not interfered with, would go beyond his lines, cannot be determined, and the same may be said of the salt water. But in either case, the right of the owner of the land to bore wells and bring up either to the surface, and appropriate it to his own use will not be denied. And if he may do so himself, he can sell that right to another. He may authorize another to sink a well, and use the salt water to be found therein, and if in the exercise of that privilege he brings up oil, it belongs to the owners of the land as much as if he had sunk the well himself. He has parted with the salt water, but not the oil, and as the well was sunk by his authority, the oil continues to be his when brought to the surface, the same as before, its character being only changed from real to personal property. No one will doubt his right to

sell the oil, as well as the salt water to the defendant, in which case the right of the latter to both would have been complete. But inasmuch as he sold the one and not the other, and both are brought to the surface by his authority, the salt water goes to the defendant under his contract, while the right to the oil remains in the plaintiff. While it remains in the earth it is as much his property as the coal, stone or other minerals embraced within his lines, and would pass by his deeds to a purchaser. But if it flows through his land, and is found on the land of another, he has no right to follow it and take it therefrom, nor would he have the right to follow and reclaim any portion of his soil that might be washed away by a flood and deposited upon the land of another. The ordinary rules applicable to the realty may be applied to this species of property, and therefore I cannot assent to the doctrine contended for by the defendant's counsel.

The second ground of defence is that the defendant is tenant for life in the demised premises, and this oil is a mere incident to his estate.

If we were to concede, which we do not, that the owner of an unconditional life estate would have the right, without any special agreement to sink wells for oil or salt water, open new mines and quarries, and work them for his own use, that would not decide this case. The defendant holds under a defeasible lease, liable to be terminated by the failure of salt water or suffering the works to remain idle for three consecutive years. He has a conditional life estate in the salt works, and as long as that continues he has the right to the possession of the few acres of land described in the lease as an incident. But upon the happening of either of the contingencies in regard to the salt works, his estate in the demised premises is to cease and determine. The salt water may fail any day, as it has done in hundreds of instances, and then the estate ends, notwithstanding the defendant may live for years. The rules then applicable to estates for life, do not necessarily apply to this case, and ought not to be extended by construction, so as to overthrow equity and justice.

If the oil in question became the property of the defendant,

because he had the right to bring it to the surface of the earth, so would the gravel, slate, iron ore, gold, silver, or other valuable minerals, necessarily dug or mined in quarrying stone, or mining coal for the construction or carrying on the works. And when sinking this well, if the lessees had struck a vein of oil such as is sometimes done now in the oil region, which had issued from the mouth of the well, yielding fifty or a hundred barrels a day, he might have refrained from boring further in that place, and sunk a salt well elsewhere and claimed that oil as his own. This principle, if recognised, would cover a large class of interests in the mineral regions of the country. A very common practice prevails among the owners of coal lands, to grant what is called "coal privileges." That is, to grant the right of mining and taking out all the coal lying under a certain piece of ground, or a given number of acres, either at a specified rate per bushel, or so much by the acre. In such case the grantee has an undoubted right to mine and remove to the pit's mouth, if necessary, all minerals or other substances found in his way, no matter how valuable they may be. And if in his operations he should happen to open one of those extensive oil reservoirs, said to be found nowadays, which should burst forth and retard his operations, he might remove it to the pit's mouth also, or let it flow out through his ordinary drains, and claim it as well as the minerals alluded to as his own. So if a person owning land in this oil and salt region should lease to another a tract of land with the privilege of sinking an oil well, for which he is to receive a certain portion of the oil, and the lessee, as in this case, should find oil and salt water together, he might claim the right to manufacture thousands of barrels of salt without paying anything therefor, while the quantity of oil might be so small as to be of very little value. So, also, if an individual or the public have a right to construct a road over the land of another; the party having such right has no claim to the timber necessarily cut down, or the clay, gravel, slate or stone dug or quarried on the line of the road, beyond what is necessary to construct the road.

Without further argument or illustration, I am satisfied the defendant is claiming what he never bargained for nor intended to purchase, and what the plaintiff never sold nor intended to sell,

and having converted this oil to his own use he is bound in equity and good conscience to pay for it.

I am of opinion, therefore, that the law is with the plaintiff on the first question reserved.

The only remaining question is whether trover is the proper remedy, or in other words whether this form of action can be sustained.

The action of trover and conversion was, in its origin, an action on the case for the recovery of damages against a person who had found goods and refused to deliver them on demand to the owner, but converted them to his own use. The circumstance of the defendant not being at liberty to wage his law in this action, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of detinue, that by a fiction of law, actions of trover were at length permitted to be brought against any person who had in his possession, by any means whatever, the personal property of another, and sold or used the same without the consent of the owner, or refused to deliver it up when demanded. The injury lies in the conversion and deprivation of the plaintiff's property, which is the gist of the action, and the statement of the finding or trover is now immaterial, and not traversable. It is an action for the recovery of damages to the extent of the value of the things converted. Lord Mansfield thus defined this action. In form it is a fiction, in substance it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use; the form supposes that the defendant might have come lawfully by it, and if he did not, yet by bringing this action the plaintiff waives the trespass; no damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or *maleficium*, and to entitle the plaintiff to recover, two things are necessary. 1st, property in the plaintiff. 2d, a wrongful conversion by the defendant: 1 Chitty's Pl. 146, 8 S. & R. 513, 3 Barr 466.

If we have succeeded in showing that the oil in question was part of the freehold; that it was severed by the consent of the owner; that he never parted with his title thereto, and that it still remained his property when brought to the surface; it is

very clear the action of trover will lie for its value. Indeed I can conceive of no other form of action at law that would be appropriate unless it would be a special action on the case. This action of trover, as we have already seen, was anciently an action on the case, and I see no substantial objection to the plaintiff being allowed now to declare in that form, rather than permit a failure of justice on mere technical grounds. But I am of opinion the action of trover will lie, and that the law is with the plaintiff on the second question reserved.

Let judgment be entered on the verdict on the questions of law reserved.

This case was reviewed in the Supreme Court as reported in 5 Wright 357. The majority of the court was for the reversal of the judgment of the court below. Thompson, J., dissented, and Woodward, J., in an opinion concurring with the majority agreed to the reversal only on the ground that trover was not the proper remedy, and sustains the position of the court below as to the right of property.

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*In the District Court of Allegheny County.*

**WILSON v. WILSON'S ADMINISTRATOR.**

(Vol. VIII., p. 81. 1860.)

1. Considerations, valuable and good, defined and distinguished.
2. A good consideration, viz., of natural love and affection, is not sufficient to support an executory contract as between the parties, or other volunteers claiming under them, either at law or in equity.
3. The seal upon a note imports consideration, and the words "value received" aver the consideration pecuniary; but this only goes to shift the burthen of proof from the plaintiff to the defendant, who may show that no such consideration passed between the parties.

*Robb & M'Connell and Woods*, for the plaintiff.

*Hamilton & Acheson*, for defendant.

The following charge, filed September, 1860, was delivered by HAMPTON, P. J.—Gentlemen of the jury: This is an action of debt, brought by the plaintiff, to recover from the defendant, as



administrator of the estate of Jane S. Wilson, deceased, the amount of a note, under seal, dated February 23, 1853, for \$6000, payable in four years, with interest from date.

It appears that in 1837 or 1838 the decedent, who was a daughter of a Mr. Snodgrass, was married to Thomas Wilson, the plaintiff's father, a widower, having several children by a former wife, among whom was the present plaintiff, then a lad of about ten or eleven years of age; that her husband lived some two or three years only after the marriage and died; that Thomas then went to reside with an uncle, who died after two or three years, when this young lad came to reside with his step-mother, and continued with her till he grew up to manhood, living there and being treated as a child by his step-mother.

He went to California in 1848 and returned in 1850, and again lived at the house of his step-mother. In February, 1853, this note bears date, and in that summer he got married, and in the fall went into partnership in business with a Mr. Gamble, and after a short time the partnership was dissolved. In October, 1854, his step-mother died of cholera, and her brother, Robert Snodgrass, administered on her estate, and filed an inventory amounting to some \$700 or \$800. In the winter of 1857 this suit was brought.

The defendants have pleaded payment with leave, &c., fraud, and want of consideration.

Three questions arise in this case.

1. How was this note obtained, fairly or otherwise?
2. If obtained fairly, what was the consideration: valuable or good?
3. If not for a valuable consideration, can the plaintiff recover?

The first question is one purely of fact for the jury. Fraud vitiates everything it touches, notes, bonds, deeds, and even the solemn records of our courts. But fraud is difficult to be proved. Almost the only method of proving it is, by showing such a set of facts and circumstances as will fairly warrant the jury in believing in its existence. If such facts be proved, when taken in connection with the situation of the parties as shock all our ideas of fair dealing, run counter to all reasonable probabilities,

and show such unusual and extraordinary acts as can be reconciled only with the presumption that some undue influence has been brought to bear upon the party, the jury may find that the transaction was fraudulent. In the language of Lord Hardwicke, it may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other: Story Eq. Juris. § 188. The jury will take into consideration all the evidence bearing on this point and determine whether this note was obtained by fraud or not.

If you find that it was, then you need go no further; the plaintiff cannot recover, and the defendant will be entitled to your verdict.

But if the note was given without any fraud or imposition, with a full knowledge of its contents, your next inquiry will be, what was the consideration for which it was given? The law divides the consideration of contracts into two kinds—valuable and good. A consideration is valuable when some benefit arises to the party making the promise, or some inconvenience to the party to whom it is made. In other words, where the party making the promise has received, or is to receive, money or property, or other thing of value, which the other party is to give or transfer.

A good consideration is when it is for natural love and affection. What were the motives or reasons which moved the parties to enter into this transaction? The plaintiff here rests his case alone on the seal and face of the note. He has not attempted to show what this note was given for. On the face of the note it is said to be for value received. This would seem to imply what is called a pecuniary consideration, and yet no attempt is made to show that any money was loaned, or property transferred, or any other pecuniary consideration given, when he alone could have informed us all about it. Indeed it would seem from the evidence highly improbable that any pecuniary consideration could have been passed. But of this the jury will judge. (Here the court reviewed the evidence on that subject.)

If there was no pecuniary consideration, then it is claimed to

have been a consideration founded on natural love and affection, and this is alleged to be sufficient to support this action.

To constitute what the law calls a good consideration, there must be a relationship by blood subsisting between the parties. Such a consideration when based upon a relationship sufficiently near, has always been held sufficient to sustain an executed contract, as between the parties. But the question arises, has it ever been held sufficient to support an executory contract, so as to give either party a remedy by action at law for its breach? Has a court of equity ever decreed specific performance of such an agreement. The promise or agreement is purely gratuitous—voluntary—no consideration moving from the promisee to the promisor—not a case of mutual promises—no advantage or benefit in possession or prospect to the promisor, and no disadvantage or injury resulting to the promisee. Consequently equity refuses to interpose, and the law leaves the parties where it finds them. The authorities going to show that specific performance is only decreed of contracts based upon a valuable consideration, are too numerous and familiar to require particular reference to be made to them. We shall content ourselves with a simple reference to 2 Story's Eq. Juris. § 798 a., and the numerous cases cited in the note. The learned author of that work says, "We have already had occasion to remark throughout the whole of the preceding discussion respecting bills for specific performance of contracts, that it has been constantly supposed that the contract was one founded upon a valuable consideration in the contemplation of law. In respect to voluntary contracts, or such as are not founded on a valuable consideration, we have already had occasion to state, that courts of equity do not interfere to enforce them, either as against the party himself, or as against other volunteers claiming under him. Thus for example, if a party should enter into a voluntary agreement to transfer stock to another, or to give him a sum of money, or to convey to him certain real estate, courts of equity would not assist in enforcing the agreement either against the party entering into the agreement, or against his personal representatives; for the party contracted with is a mere volunteer. The same rule is applied to imperfect gifts, not testamentary, *inter vivos*, to im-

perfect voluntary assignments of debts and other property, to voluntary executory trusts, and to voluntary defective conveyances." And the rule seems to be the same, whether the contract be under seal or not. "The general rule seems now to be established, that the court will not execute a voluntary contract, but will withhold assistance from a volunteer, whether he seeks to have the benefit of a contract or covenant, or a settlement: Id. § 793 b. See also 1 Story Eq. § 433, and the authorities there cited in note.

The doctrine here laid down would be broad enough to cover this case, if the bond had been given by a mother to her son or other near relation by blood. But when it is considered that there was no relationship whatever by blood and no meritorious consideration springing out of any previous benefit derived by the step-mother from the plaintiff's father; that all the property she had she inherited from her own father's estate, the rule assumes an anomalous aspect, which would sweep all her patrimony from her own brothers and sisters and give it to a stranger. If there was no pecuniary consideration, this instrument is nothing more nor less than a promise to give the plaintiff the sum of \$6000, with interest from date. It is simply a promise to make a gift to that amount four years after the promise. If this had been a promise to assign stock to that or any other amount, or to make a gift of a personal chattel, or to convey real estate, or to assign a bond, or to give him a sum of money, we have seen by the authorities referred to such promise could not be enforced either at law or in equity.

In *Fink v. Cox*, 18 Johns. 145, it was held that a voluntary note, given by a father to his son, without any pecuniary consideration, could not be enforced on the ground of natural love and affection. But it is said because the instrument sued on here is under seal, the defendants are precluded from setting up this defence.

What, then, is the legal value of the seal? It imports consideration, so that the plaintiff may recover on a sealed instrument without showing any consideration, even though none be expressed on the face of the instrument. But this is only a presumption of law, liable, like all other *prima facie* presumptions,

to be rebutted. It shifts the burden of proof from the plaintiff to the defendant. So far as the question now under consideration is concerned, this is the only legal value of the seal, nothing more, nothing less. The bond in suit states on its face that it was given for value received, which in law avers, when signed and sealed, that it was given for a pecuniary consideration. But under the well-settled practice in this state the defendants were allowed to show, as far as they could do, that there was no such consideration passed between the parties as that mentioned in the bond. The seal in this case performed its legitimate office by enabling the plaintiff simply to read the bond and rest his case. The burden was thus thrown on the defendant of proving a want of consideration, such as was mentioned in the bond. Why, then, should the seal be more efficacious in a mere promise to make a gift than a promise to pay money? No conceivable reason, it seems to me, can exist in the one case more than the other for the supposed sanctity of the seal. The foregoing principles are sustained by the following cases, in addition to those already cited :

In *Royer v. Rusford*, 1 Sanford Ch. 258, it was held that collateral consanguinity is not a meritorious consideration upon which a court of equity will enforce specific performance of an executory covenant or agreement. And in *Pennington v. Gittings*, 2 Gill & Johns. 208, it was ruled that the consideration of natural love and affection is sufficient in a deed ; but a mere executory contract which requires a consideration, as a promissory note, cannot be supported on the consideration of blood or of natural love and affection ; something more is necessary, some valuable consideration, or it cannot be enforced at law or in equity. See also *Black v. Cord*, 2 Har. & G. 100. The sealing of an instrument is a legal implication of consideration. It dispenses with proof on the part of the plaintiff. The *onus* of showing it is without consideration is cast on the defendant. If he is able to make it appear, the defence is available : *Mattock v. Gibson*, 8 Richardson (S. C.) 487.

Natural love and affection between near relatives, although a sufficient consideration to support a deed or an executed contract, yet will not render obligatory a mere covenant, or promise, or

agreement: *Duvall v. Wilson*, 9 Barb. S. C. 487. See also 10 Id. 308.

It only remains for us to apply these principles to the facts of this case.

You will inquire and ascertain, therefore:

1st. Whether the note in suit was obtained by fraud, misrepresentation or any other unfair practices whatever. If it was, the plaintiff cannot recover. But if not, then,

2d. Whether there was any pecuniary or valuable consideration for the note. If you find there was, then the plaintiff will be entitled to your verdict. But if you should be of opinion there was no such consideration, then the plaintiff cannot recover, there being no sufficient consideration to sustain the promise.

The jury found for defendant.

*Kennedy's Exrs. v. Ware*, 1 Barr 450; *McClure v. McClure*, Id. 374; *Crawford's Appeal*, 11 P. F. Smith 52.

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*In the Supreme Court of Pennsylvania.*

**MERSHON v. HOOD & Co.**

(Vol. VIII., p. 171. 1860.)

1. Where defendant by his testimony in chief puts his defence solely upon the ground of payment, and plaintiff merely replies by disproving it, it is too late then to set up a new, independent defence under cover of a rebuttal of the plaintiff's reply.
2. The rule, as broadly laid down, making the whole of a party's admission, deposition, statement or answer, evidence when his antagonist has used part, for the reason given that without the context, the precise meaning of the part used may not be apprehended, does not apply when the context relates wholly to other matter.
3. That the court did not comment upon all the evidence, and bring each fact specially to the attention of the jury, has always been held no reason for reversal.

**ERROR to the Common Pleas of Westmoreland county.**

*Marchand and Armstrong*, for plaintiff in error.

*Cowan*, contra.

The opinion of the court was delivered by

STRONG, J.—To comprehend fully the merits of the first assignment of error, it is necessary to observe the course of the trial in the court below. The plaintiff, being the attaching creditor, gave in evidence an agreement between the debtor and the defendant, who was the garnishee, by which the latter agreed to purchase from the debtor a stock of merchandise at a price subsequently ascertained to be \$2452 28. Some evidence was also given of other indebtedness of the garnishee, to the execution debtor. Here the plaintiff rested his case. The defendant, then, in order to show that the consideration for the sale of the merchandise had been paid, gave in evidence certain promissory notes in his possession alleged to have been given by him to secure the stipulated price for the goods. The sole purpose of this evidence was to establish that he had paid the debt incurred by him in the said purchase. Among the notes thus exhibited by him were two, one for \$700, and one for \$400, both having the same date with that of the agreement. After giving some further proof of payment and of set off, he closed his defence. To rebut the presumption of payment arising from the defendant's production of the notes, the plaintiff then read in evidence the defendant's answer to the 6th interrogatory which had been propounded to him as garnishee, in which answer was an acknowledgment that the two notes for \$700 and \$400 had never been paid, coupled with the assertion that the contract between the garnishee and the execution creditor had been rescinded before the attachment was laid. The defendant then proposed to read his answer to all the other interrogatories. This the court refused to permit him to do, except so far as those answers were connected with the answer to the sixth, which had been read. This refusal is the first alleged error.

It is to be observed that so far as the answers to the other interrogatories were connected with the defendant's answer to the sixth, he was not prevented from reading them. Now, the first remark we have to make respecting this assignment of error is, that it does not appear that the decision of the court worked any injury to the plaintiff in error. Had he been permitted to read all the answers, his case would not have been improved.

There was nothing in them which tended to establish that those notes had been paid, and in the stage of the trial, in which those answers were proposed to be read, nothing less than their payment could be in controversy. By his testimony in chief, the defendant had put his defence solely upon the ground of payment, and the plaintiff had merely replied by disproving it. It was too late then to set up a new, independent defence, under cover of a rebuttal of the plaintiff's reply. And, if it were not so, then there was nothing in the rejected parts of the answers to the other interrogatories which could have availed the plaintiff in error, if they had been received. Nothing has been pointed out to us, and we see nothing. The matter of which he principally complains is, that he was not permitted to read the endorsement upon the article of agreement. But that endorsement was no part of any of the answers, nor was it referred to by any one of them. If it had been mentioned, though only by reference, in answer to the sixth interrogatory, doubtless it would have been error in the court to have refused to permit it to be read, and that is all which is decided in *Erskine et al. v. Sangston*, 7 Watts 150. Perhaps it would have been so if it had been mentioned in any answer. Certainly the rule is that a defendant has a right to insist upon having the whole of his answer to any one interrogatory read, when the plaintiff has read a part of it. How much is embraced in the rule—whether it covers different answers to different interrogatories, this case does not compel us to inquire. I am aware that it is broadly laid down, that it makes the whole of a party's admission, deposition, statement or answer evidence, when his antagonist has used part, but the reason given for it is, that without the context the precise meaning of the part used may not be apprehended. The reason fails when the context relates wholly to other matter. Whether answers to interrogatories propounded under an attachment execution are to be treated as an entire answer to a bill in equity, we do not say. They resemble much separate answers to separate bills of discovery. Certainly the whole of any one must be read, if any part, as well as all papers to which it refers, but the reason which demands this does not exist when the attempt is made to read other answers entirely independent—relating wholly to other matter.



But if it be conceded that, the plaintiff having read one answer, the defendant was entitled to read every other, the exception fails in this case, because the decision of the court has done the plaintiff in error no injury.

A very few words will dispose of the other assignments of error. None of them are sustained. That the court did not comment upon all the evidence, and bring each fact specially to the attention of the jury, which is the substance of complaint in the second and third exceptions, has always been held no reason for reversal. The fifth and sixth are based upon a mistake of fact. We think there was such evidence. The instruction of the court, excepted to in the fourth assignment of error, was even more favorable to the defendant below than he had a right to claim. Surely, accepting notes for a part of a debt is no evidence of a release of the balance. Consequently the answer of the court to the defendant's first point was right. The only remaining exception to the charge, is to the answer given to the defendant's fourth point. It was, that the plaintiff having given in evidence part of the answer of the garnishee to the sixth interrogatory, the whole of the answer must be taken together, but that it was not conclusive against the party offering it, and might be explained or rebutted by other evidence. It has never yet been held that the jury might not disbelieve part and believe part of a defendant's statement when the whole was given in evidence by the plaintiff. If it be conclusive, as contended, and contain contradictory averments, it is impossible that both should be true. There was no error in this instruction.

The judgment is affirmed.

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*In the Quarter Sessions of Allegheny County.*

COMMONWEALTH v. ALEXANDER McCONNELL.

(Vol. VIII., p. 290. 1861.)

1. That clause of the Act of Assembly giving exclusive jurisdiction to the Courts of Oyer and Terminer in "all voluntary and malicious burnings

punishable in the same manner as arson," Criminal Procedure Act of 1860, section 31, has reference to the extent and degree as well as to the kind of punishment.

2. Where a felony and a misdemeanor are both made punishable by a fine and imprisonment, they cannot be said to be punishable in the same manner, if the extent of the imprisonment limited to each is different, although the court might in its discretion make the time in both identical. Yet it is to be presumed the court will subject the graver offence to the greater punishment—felony and misdemeanor are not punishable in the same manner, although they may be so punished.
3. The crime described in section 137 of the Penal Code of 1860 is a felony, and to be tried in the Court of Oyer and Terminer.
4. The offence described in section 138 is a misdemeanor, and to be tried in the Court of Quarter Sessions.

#### INDICTMENT for an attempt to burn machine shops, &c.

A motion for a new trial, and in arrest of judgment was argued by Hon. *P. C. Shannon*, for the prisoner, and by *John H. Hampton*, Esq., for the Commonwealth.

The following opinion, overruling the motion, was delivered March 16th 1861, by

MELLON, A. J.—On the 17th day of January, 1861, Alexander McConnell was tried and convicted in the Court of Quarter Sessions, upon an indictment charging him with a misdemeanor, in wilfully and maliciously attempting to set fire to a certain machine shop and building, the property of the Cleveland and Pittsburgh Railroad Company, with intent to burn the same. His counsel thereupon moved the court for a new trial, and in arrest of judgment, and have assigned for reason, "that the Court of Quarter Sessions had no cognisance of the case, and that the Court of Oyer and Terminer has exclusive jurisdiction of the offence charged in the indictment."

This raises an important question; for, if the Quarter Sessions had no jurisdiction, the trial was unauthorized, the conviction void, and no authority is conferred on the court to pass sentence. The difficulty grows out of the changes made by the new Penal Code. The enactment on the subject of jurisdiction was not changed so as to correspond with the changes made in the classifi-

cation and description of arson, and other different kinds of malicious burning. The same identical offence in one section of the code is described as a felony, and in the next as a misdemeanor.

And in this particular instance, the remarks of the commissioners are made to disagree with the enactments to which they refer. It would seem as if the commissioners had perfected the plan, and left it to others, unacquainted with the business, to carry it out in detail. Or, possibly, in its passage through the legislature, this part of the Code may have received certain interpolations, or alterations. The Act of 16th June, 1836, on the subject of jurisdiction, is left unrepealed: Remarks of Commissioners, p. 44. It is introduced into the Code, however, improved somewhat in its arrangement and verbiage. Hence, we have two versions of the same text in full force—the original, and that contained in the code; but neither relieves the difficulty raised in the present case. Are the crimes and offences, enumerated and described in the 137th and 138th sections, to be punished in the same manner as arson, and therefore all to be tried in the same court? If so, there has been a mistrial of this defendant. The Code declares the offences described in the section 137 to be felonious arson; and those described in section 138 to be misdemeanors. If we turn to the remarks of the commissioners, page 32, we have no difficulty in getting at what was intended; but when we turn to the sections of the law themselves, to which these remarks refer, we find the text disagrees with the commentary.

In regard to these sections of the Code, the commissioners' remarks are as follow: "Sections 137 and 138 provide against various kinds of malicious burnings, and attempts to burn. They are amendments, and extensions of the different prior existing acts on the subject (here enumerated). The section 137 refers to the burning or attempting to burn a dwelling-house, or any out-house parcel thereof, or any other building by means whereof a dwelling-house shall be burnt. Regarding the burning of a dwelling-house as the most heinous of this class of offences, the commissioners propose its exemplary punishment. The fact of any person being in a dwelling set fire to, or burnt, renders the offender liable to a much heavier punishment. This distinction

the commissioners think necessary, in order to the protection of human life, which is frequently endangered by the malicious burning of dwelling-houses." Section 138 provides against the malicious burning, or attempting to burn, the buildings therein enumerated not being dwelling-houses; or any barrack, stack of hay, grain or bark, &c. The punishment provided against these offences, though sufficiently severe, are less than in the preceding section."

Section 137, above referred to, is in substance as follows:

It shall be felonious arson to maliciously and voluntarily burn, or set fire to, or attempt to set fire to with intent to burn, any factory, mill, or dwelling-house of another, or any kitchen, shop, barn, stable, or other out-house, that is parcel of such dwelling, or belonging or adjoining thereto; or any other building, by means whereof a dwelling-house shall be burnt; and the party so offending, shall pay a fine not exceeding \$2000, and suffer imprisonment at labor, &c., not exceeding twelve years; and in case there is any person in such dwelling-house, or building that is parcel thereof, the fine shall be (increased), not exceeding \$4000, and the imprisonment not exceeding twenty years.

It is obvious, that the uniformity of this enactment would be improved by dropping the words "factory," and "mill," and placing them in connection with the words "barn," "shop," &c. The entire section would then conform to its main design, viz: protection to human habitation, and also agree with the remarks of the commissioners, which make no mention of "factory," or "mill," whatever.

Section 138 is in substance as follows:

It shall be a misdemeanor, wilfully and maliciously, to burn, set fire to, or attempt to set fire to, with intent to burn, any barn, stable, or other building of another, not parcel of the dwelling-house, or any shop, storehouse, or warehouse, malt-house, mill, or other building of another, or any barrack, rick, or stack of grain, hay, fodder or bark, piles of wood, boards or other lumber, or any boat, ship, wooden bridge, &c.; and the offender shall pay a fine not exceeding \$2000, and undergo an imprisonment at labor, &c., not exceeding ten years.

The jurisdiction of the courts is thus prescribed:

The Court of Quarter Sessions shall have jurisdiction *inter alia*, "of all such crimes, misdemeanors, and offences whereof exclusive jurisdiction is not given to the Court of Oyer and Terminer."

The Court of Oyer and Terminer shall have exclusive jurisdiction to try, &c., all persons charged with the crime of "voluntarily and maliciously burning any building, or other thing made punishable in the same manner as arson: Sections 81 and 82, Penal Code; title, Courts.

Arson, as defined in section 187, is punished by fine and imprisonment. The other kinds of wilful and malicious burning, enumerated in section 188, are also punishable by fine and imprisonment. The same offence, wilfully and maliciously burning, or attempting to burn a mill, is declared to be malicious arson in the one section, and a misdemeanor in the other. Certain classes of burnings, mentioned in section 188, are equally heinous in every respect as those mentioned in section 187. In letter and spirit, therefore, it is contended, that those burnings enumerated in section 188, fall within the definition conferring on the Court of Oyer and Terminer exclusive jurisdiction—all are "voluntary and malicious burnings, punishable in the same manner as arson."

When we regard the jurisdiction clause of this act, in view of the state of the law at the date of its original enactment, we find it perfectly appropriate. At the time the law in regard to arson consisted of various and different enactments, previously made from time to time. In some of them, the offence described was simply declared to be arson. In others the term arson was not used, but an offence of equal enormity, and similar in its nature and punishment, was described. Hence, in the act giving the courts jurisdiction, general terms were appropriately used, and such description as would include every species of burnings equivalent to felony, whether declared to be arson or not.

Arson is felony at common law. Our Code recognises felonious arson, as distinguished from such malicious burnings as amounted at the common law only to a misdemeanor. In this respect the Code limits and reduces the subjects of felonious arson, as heretofore existing in our law, and brings it nearer to

the common law. At common law it was limited to dwellings and barns, containing grain or hay, &c. The Code, I take it, limits arson now to factories and dwellings; because to promote the obvious intent of the law and avoid the absurdity of declaring the same offence a felony in one section and a misdemeanor in the other, it is necessary to read "and" for "or," connecting mill and dwelling-house in section 137.

It appears at all events that the offences enumerated in section 137 are alone declared to be arson, and that those enumerated in section 138 are not arson with us since the enactment of the Code, whatever they may have been before, but are now misdemeanors only. It is evident, too, that the legislature considered the crime of arson in section 137 as more heinous, and to be punished with much greater severity, than the misdemeanor provided for under section 138. Although the punishment is the same in kind, it is not the same in degree. The court, it is true, may, in passing sentence, make the punishment identical under both sections; but this is not the intention of the law, or duty of the court, and the law must be interpreted on the hypothesis that its officers perform their duty. In that case, the crimes described in section 138 would not be punished in the same manner as the crime of arson described in section 137. The wilful and malicious burnings described in section 138 are punishable, not in the same manner as arson, but in the same manner as misdemeanors are punishable; and it cannot, therefore, be said, with strict propriety, that the offences described in these two sections are "punishable in the same manner." To say that the punishment is the same in kind will not do, for nearly every species of offence, except capital crimes, is punishable by fines and imprisonment.

It appears to me, therefore, that according to the spirit and intent of the law, every species of burning described and enumerated in section 138 is properly cognisable in the Court of Quarter Sessions.

In another point of view, it is obvious the case under consideration does not fall within the scope of the clause giving exclusive jurisdiction to the Court of Oyer and Terminer. That clause has reference only to actual burnings, "voluntarily and

maliciously burning any building," &c. The charge of which the defendant stands convicted is not for burning, but for "an attempt to set fire to." The one is an offence consummated, the other an attempt to commit an offence. Burning the building or some part thereof was requisite to constitute arson at common law; an attempt to burn was but a misdemeanor and so punishable: 2 Russell on Crimes 486. With us, under the Code, an attempt merely to burn a factory or dwelling-house might amount now to arson and be punishable as such; but the Court of Oyer and Terminer, though it might have jurisdiction by reason of the graveness of the felony, would not have exclusive jurisdiction in virtue of the exclusive jurisdiction clause of the act, because it is only in cases of burning that exclusive jurisdiction is expressly given by that clause of the act.

In fine, it appears to me that the case under consideration neither comes within the letter nor spirit of the Act of Assembly conferring exclusive jurisdiction on the Court of Oyer and Terminer; and by the terms of the same act cognisance of all other offences is given to the Quarter Sessions.

For these reasons, the motion for a new trial and in arrest of judgment must be overruled.

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*In the District Court of Allegheny County.*

HOLMES ET AL., OWNERS OF THE STEAMBOAT HIBERNIA, v.  
MORGAN NELSON ET AL.

(Vol. VIII., p. 314. 1861.)

1. A stockholder or attorney of a corporation of another state, while here attending to, or preparing for, legal proceedings, to which the corporation is party, in the United States courts, and in coming and returning, is protected from all other civil process—the same as if he were individually party to the suit, and resident in this state, and the proceedings upon which he attended were in the state courts.
2. Liberality of the constitutional privileges granted the citizens of each state in the several states.

THIS was an action on the case brought against the defendants

as stockholders in the Wheeling and Belmont Bridge Company to recover damages for injury alleged to have been sustained by the plaintiffs by reason of the obstruction of the river, and their consequent inability to navigate the same as they have heretofore done.

The defendant, Morgan Nelson, who was the only one served, was served with the process of summons while attending in Pittsburgh, in the double capacity of a stockholder and attorney, upon a notice to take depositions, in the case depending in the Supreme Court of the United States, between the state of Pennsylvania and the Wheeling Bridge Company.

Upon this state of facts, a rule was taken by his counsel upon the plaintiffs, to show cause why the service of the writ should not be set aside upon the ground of privilege.

The question was argued upon the hearing by Messrs. *Williams & Kuhn* for the defendants, and by *C. Shaler, Esq.*, for the plaintiffs, and the rule made absolute upon the following opinion, which was delivered, January 5th, 1850, by

LOWRIE, J.—In the case of *Wicks v. Brown*, determined in January last year, this court decided that a counsellor at law coming from another county to attend to the cases of his clients before the Supreme Court of the state sitting here, is exempt from the service of a summons in a civil action, in going, remaining and returning.

In the opinion delivered in that case, it was shown that this is not an immunity of particular individuals, but of all persons under certain circumstances, on the principle that, where the law requires any duty of the citizen, it will protect him in the discharge of that duty; and that individuals cannot demand the use of public civil process, so as to arrest or interfere with others in the performance of public duties, or of duties required by public process.

On these grounds, the exemption is secured to all legislators, voters and militiamen, while their duties as such continue. It is secured to all jurors, parties, witnesses, law agents, and even common agents of the parties while *bonâ fide* attending the court,



and before any persons substituted *pro hac vice* in the place of the court, in relation to any pending judicial proceeding, and in going thither and returning thence. And it is very important and very right that persons leaving the place of their domicil to attend to such duties, in obedience to a direct or indirect requirement of law, should be protected by the law, while so engaged, from being caught up to answer to actions brought in a different place from that of their domicil.

It was also shown that this exemption extends to the service of summons as well as to arrest, because our summons answers substantially the same purpose as the *capias* did under the English practice, in enforcing an appearance, and the exemption did not in most cases, in England, extend to a summons, because the place of service could not affect the place of trial, as it does here.

On the present occasion, none of these principles are disputed ; but the case is attempted to be distinguished on the ground that the defendant is, as to our state institutions, a foreigner, and the United States court a foreign court, and the defendant in the previous action a mere corporation, a creature of foreign law, and not properly any individual person.

A corporation, however, is a collection of individuals, united under a special name, and, in some instances, it is no more—the corporate name and its consequence, corporate succession, being their only special privileges. The defendant here is one of these individuals ; as such it became his duty to give attention to the whole process of the case in the Supreme Court of the United States. The law calls upon him to prepare for the trial of the cause brought against the corporation of which he is a member, and the law protects him from all other civil process while specially obeying that call. It protects him in every step of that procedure. Even when his attention to it calls him out of the local jurisdiction of the forum which has cognisance of the case, he carries his immunity with him, and it becomes the duty of the tribunal before which he is improperly cited, to interpose the shield of the law for his protection.

Besides this, the defendant here was, at the time of the service of the writ, acting as the attorney-at-law of the corporation de-

fendant in the other case, in taking depositions before a commissioner, for the purpose of that case, and as such he is protected. In this respect, the privileges of corporations are no less than those of individuals. Being liable to action, they are entitled to protection in preparing and making their defence.

Is then the fact that the defendant here is a citizen of another state, a ground to distinguish this case from the general rule?

Such conclusion is prevented by the Constitution of the United States, article IV., sect. II. 1, which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

This is a noble feature of our Constitution, and should be honestly and generously administered. It contains one of the most magnanimous principles of modern international law, which requires that justice shall be administered to foreigners by the same rules as to citizens. It is a special application of the great Christian rule of intercourse, "whatever ye would that men should do to you, do ye even so to them." And we rejoice to do honor to our own state for its liberal legislation, in providing the same process against foreigners as against citizens, for the commencement of actions, it being, as a general rule, a summons for all, and not a *capias* for the former and a summons for the latter.

And we have no fear that this principle will ever infringe upon any honest view of state rights. It will, no doubt, sometimes, put to shame that low, ridiculous, and selfish state rights clamor, which never rises to a single magnanimous conception, but stands at all times ready for battle or for bluster, when anything is projected or attempted that is incompatible with its illiberal, ungenerous, and selfish motives. Let such persons act out their principles; it is for us to carry out the generous principles of our law, administering "one manner of law as well for the stranger as for one of our own country," or state. Lev. xxiv. 22.

Does the fact that the proceeding, out of which the immunity is claimed to arise, is before the Supreme Court of the United States, affect the question?

That tribunal is not a foreign court. As the Constitution of the United States is part of our law, so its tribunals are a part of our institutions. It is, therefore, by our law and before one

of our own institutions that the defendant corporation was sued ; and by our law, the parties and their witnesses and counsel are protected while attending to that duty. The principle is, that when our law requires certain duties, it grants certain corresponding immunities, and this principle covers a case when the duty arises under a law of the Union. It makes no difference whether others adopt our laws or not. Whatever be the extent of the exemption granted by our law, that exemption applies as well to strangers as to citizens, and to suits in the courts of the Union, as to suits in our state courts. But neither the rule nor the reason of it extends to the protection of the suitors of a tribunal unknown to our law.

My brother Hepburn and I both heard the argument in this case, and we both unite in this opinion. If we had any doubt about the question, we should endeavor to put it in some form whereby our opinion might be reviewed. But our minds are clear of doubt.

Let the rule be made absolute for quashing the service of the summons.

Key v. Jetto, 1 Pittsb. 117, and cases cited ; The United States v. Edme, 9 S & R. 147 ; Kinsman v. Reinex, 2 Miles 200.

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*In the Common Pleas of Butler County. In Equity.*

MCGINNIS ET AL. v. WATSON ET AL.

(Vol. VIII., p. 321. 1861.)

1. Where a writing conveying the title in trust for a religious society, is silent as to the nature of the worship intended ; it will be implied from the denominational connection and the usage of the congregation at the time of the grant and afterwards.
2. Such a trust, for a congregation of Seceders, subordinate to the Associate Synod of North America, is for the congregation, and not for the Associate Church at large.
3. A trust is a civil right, which must be administered according to the intent of the parties to it, and cannot be affected by an act of ecclesiastical government, changing the church relation which was intended to be advanced by the trust.

4. It was incompetent for the Synod of the Associate Church, by an ecclesiastical union with the Associate Reformed Synod merging the name, separate existence and history, and the peculiar standards of the former in a new body called the United Presbyterian Church, and changing the church relations of the members, to carry the rights of property of the congregation into the new church.
5. The fragment of the Associate Church, which in 1782 refused to go into the Union between the Associate and the Reformed Presbyteries, protested and continued its relation to the Associate Synod of Edinburgh, is that which was known as the Associate Church in 1803, when this trust arose, and down to the Union with the Associate Reform Church in 1858. This secession church stood in an attitude of repugnance to the Reformed Presbytery, one of the elements of the Union of 1782, and to the Associate Reformed Church after that Union, as shown in its narrative and other acts.
6. By the adoption of the "basis" of Union in 1858, between this secession church, and the Associate Reformed Church, the former became merged in the United Presbyterian; losing its distinctive name, existence and identity of origin and history, its peculiar and distinctive standards and acts of church government, and the means of enforcing its own rigid practice and its peculiar interpretation of the common Presbyterian standards; all of which lying at the foundation of this trust, the members of this congregation were not bound to follow the ecclesiastical body into the Union; and the title remains with that portion of the congregation even though a minority, who stand still, and continue in the old church relation.

THE leading facts of the case, as they appear in the bill, answer and proofs, are the following:

Unity Congregation, Venango township, Butler county, was organized in the year 1800, the Rev. Thomas McClintock, of the Associate Church, being the pastor. Its members were of the Associate Church, and in ecclesiastical connection with the Associate Synod of North America; and so continued until the Union of 1858, between the Associate and Associate Reformed Churches.

In 1803, Robert Leason, by agreement in writing, sold to "James Scott and Reuben Irwin, trustees for Rev. McClintock's congregation, two acres of land, including the meeting-house and spring near it, for the proper use and behoof of the congregation, to have and to hold for ever."

In 1833, the former article being supposed to be lost, Leason, by a second writing, agreed to sell and convey to persons named therein, "trustees legally chosen for said congregation" two acres and twenty perches of land, by metes and bounds, "including the brick meeting-house and burying-ground," in con-

sideration of \$22 55; and to "give immediate possession, and to give the said trustees or successors, for the use of the said congregation (Unity) for ever, a complete and perfect title." A postscript to this writing, signed by Leason, states the loss of the former, and that this is signed to secure the Congregation of Unity in the same property, in a slightly different shape. In 1836, Leason receipted for the purchase-money in full.

After the Union, by an act approved March 29, 1859, that portion of the congregation entering into the Union, were incorporated under the name of "The United Presbyterian Congregation of Unity Church of Venango township in the county of Butler." To this incorporation, Leason conveyed the premises, by deed of August 4, 1859.

In May, 1856, the Associate Synod of North America, approved of a basis of Union with the Associate Reformed Church, which was sent to the Associate Reformed Synod for approval, and also overtured to the Presbyteries and Sessions of the Associate Church.

In May, 1857, a large majority of the Presbyteries approving, the Associate Synod, by a vote of 104 to 13, adopted the basis, the declaration without amendment, and the argument and illustration, in their amended form, and transmitted it to the Synod of the Associate Reformed Church, then in session, which adopted it in confidence of future amendments being made, to harmonize the faith and practice of the two churches, and that reasonable forbearance will be exercised to those constrained to dissent from any article in the basis.

On the receipt of this resolution of the Associate Reformed Synod, the Associate Synod reciprocated this confidence of forbearance, with the proviso that no one be permitted to teach or to act in opposition to the doctrine, and order of the church. A committee from each synod was appointed to make arrangements for the Union, who reported to their synods in 1858. In May, 1858, the synods respectively acted on the report, and finally united on it in a slightly amended form. The preamble consisted of two sections; one reciting the understanding, that the basis should be a term of communion, and the other the forbearance to be exercised toward the brethren, who could not fully

subscribe to the standards of the United Church. The Union was forthwith formally consummated with proper ceremony, under the name of the United Presbyterian Church of North America. The synods of the respective bodies, were continued for certain special purposes. The Associate Synod, including the Moderator, adjourned on its own motion to Xenia, Ohio, in May, 1859. By the proof it appears, that seven ministers of the Associate Synod protested against the act of Union. In the Minutes 1858, pp. 86 and 88, the protest of Revs. McAuley, Hindman and others, appears to have been read and filed.

The presbytery of Indiana (according to the proof), after consulting the protesting members of synod, called a synod of the Associate Church, composed of the protesters, to meet in Canonsburg, Pa., in 1859, the witness, Rev. McAuley, being one who signed the call.

The presbytery of Clarion, composed of the Revs. Hindman and McAuley, and two or three elders, became subordinate to the synod of the Associate Church, called and held at Canonsburg by those who protested. That portion of the Unity Congregation which refused to go into the Union, petitioned the presbytery of Clarion for a minister, and accordingly the Rev. John M. Snodgrass was duly installed, and a communion held by him, with the assistance of Rev. McAuley, in August, 1858.

In reply to the overture of 1856, the Shenango Presbytery, of the Associate Church, to which Unity Congregation was attached, reported to the synod of 1857, its unanimous adoption of the basis of Union. The session of Unity Congregation, at a meeting in February, 1857, composed of the pastor and the elders, approved of the basis, "with some small emendations." This basis had previously been read from the pulpit for information, and printed copies were in circulation in the congregation. No formal meeting or election was held by the congregation, to act upon the basis. Unity Congregation, at the time of Union, 1858, had about one hundred and thirty members, of whom about seventy-three went into the Union, and held possession of the premises in controversy. About fifty-eight, including several suspended members, refused to go into the Union. The bill, in this case, is presented in behalf of this minority against the

majority of the congregation, to regain possession and control of the church property, on the ground that the grant by Robert Leason, was to a congregation professing the doctrines, and adhering to the government of the Associate Church according to its standards, as they existed in 1808, and that the Union, is such a departure from these, that the dissenting members cannot be compelled to follow.

*Mitchell & McClure*, for complainants.

*Purviance & Kirker*, for respondents.

The opinion of the court was filed March, 1861, by

AGNEW, P. J.—In considering the foregoing statement, two principal facts appear: 1st, that the property in the church building and ground, was vested by the title papers in the congregation, and not in the church at large. 2d, that the act of Union was purely ecclesiastical, and did not profess to meddle with church property.

The written agreement, and payment of purchase-money, vested in the congregation the entire equity, and fifty odd years' possession, both by limitation of time and a presumption of grant, vested in it the legal title. The deed to the United Church in 1859, therefore, amounts to nothing. The question presented then is: What effect had this ecclesiastical union upon the civil rights of the parties?

Civil rights, to which rights of property belong, are exclusively within the jurisdiction of the civil tribunals, and a private right of property cannot be transferred from one citizen to another, even by the legislative power of the state, except in the enforcement of civil rights, and for certain high purposes of public use. Much less, then, can an ecclesiastical body change rights of property. The policy of this state is further evinced in the Act of 1855, which provides that property held in trust for religious uses, shall be subject only to the control of the lay members or of such constituted officers or representatives as are composed of a majority of lay members, having a controlling power. The action of the Presbytery of Shenango, and of the Session of Unity Congregation, was nothing more than an approval of the

basis, overtured to them by the Synod of the Associate Church. Upon looking into the basis, which is in proof, we discover it to be only a statement, or testimony of the doctrines and faith of the church; and the resolutions of Union are merely an adoption of this basis, and a provision for the name of the United Body, and for its ecclesiastical government. The action of the church judicatories, and the acquiescence of the majority of the congregation, had reference, therefore, merely to ecclesiastical affairs.

What were the rights of property of the congregation before the Union, and what effect did it produce upon them?

In *Lex v. Whitman*, 17 S. & R. 88, recognised in *Methodist Church v. Remington*, 1 Watts 224, and followed in *App v. Lutheran Congregation*, 6 Barr 201, and other cases, a trust in favor of an unincorporated religious congregation is held to be an available one, and will be enforced in a court of equity.

It is also settled by the decision of Lord Eldon, in *Attorney-General v. Pearson*, 3 Meriv. 353-400, recognised in this state in *Presbyterian Congregation v. Johnston*, 1 W. & S. 37-45, that "when a house is erected for religious worship, and it cannot be discovered what was the nature of the worship intended by it, it must be implied by the usage of the congregation; and that it is the duty of the court to administer the trust in such a manner as best to establish the usage, considering it a matter of implied contract with the congregation."

Both by proof and admission it appears that Unity Congregation was composed of members of the Associate Church, subordinate to the Associate Synod of North America, and so continued, and was ministered to by pastors in the same connection down to the time of Union. The grant, therefore, was clearly for the use of a congregation of "Seceders," as they are generally known, in connection with the Associate Church. Their rights of property must, therefore, depend on their connection with that church. This brings us to the decisive question in the case. Which portion of the members, the majority or the minority, is truly this congregation of Seceders, and is entitled to represent Unity Congregation in reference to the trust? The test of this is adherence to the principles, for the maintenance of which the trust was originally founded. This is settled by decisions in



England, Scotland and our own state. In *Craigdallie v. Arkman*, decided in the House of Lords, Lord Eldon shows that the older Scottish rule of the majority decision, as to test of title, is unsound, and "involved a power in the majority against just principles of the law of trusts, to divert from the purpose for which it could be shown clearly to be held, property bought or built with common funds for that purpose. The sole question in every such case is whether the congregation itself, or what portion, adheres to the principles the maintenance of which formed the purpose of the original trust." Again he says, "if there was no such provision (*i. e.*, in the case of schism) in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society at the expense of a forfeiture of their property, by the *cestuis que trust*, for adhering to the opinions and principles in which the congregation had originally united:" 1 Dow. 16.

In *Craigie v. Marshall*, decided in 1850, by Lord Justice Clark and Lord Moncrief, referred to in the *Thurso Property Case*, presently to be noticed, Lord Moncrief is quoted as saying: "In such questions between the members of a congregation, originating in supposed differences of religious principles, the civil right is to be determined by the question whether one party or the other is adhering to the original principles on which the society was formed or the congregation founded." To the same effect he quotes the principle, as stated by Lord Medwin, in *Smith v. Galbraith*, in 1837, "if we can find out what were the original principles of those who originally attended the church, we must hold the buildings appropriated to the use of the persons who adhered to the original principles, though these be a minority of the congregation." It was held in this case that the resolutions of the Synod or governing body were not obligatory on the congregation, so as to compel the members to go along with the governing body, at the peril, if they refused, of losing their right and interest in it.

The strongest case, most elaborately considered, and almost a parallel to this, is the *Thurso Property Case*, reported in the *Original Secession Magazine* for January, 1860, printed in Glasgow, in Scotland, p. 430. The decision was delivered by Lord

Wood, in the second division of the Court of Sessions, and made by four judges. The question grew out of the union in 1852, between the "Free Church of Scotland" and the "Synod of United Original Seceders."

The associate body, known as the "Synod of United Original Seceders," divided upon the resolution of union with the Free Church, thirty-two voting for it, and thirty-one against it; the latter protesting and withdrawing, and declaring themselves to be the Synod of United Original Seceders.

In consequence of this, the congregation of United Original Seceders, at Thurso, divided; the pastor and majority going into the union, and retaining possession of the church property, and the minority adhering to the protestant minority of the Synod. The title of the property was to the "Managers and Trustees for the said associate congregation of Thurso, in connection with the General Associate Synod of Edinburgh, and under the ministerial inspection of the now deceased Rev. Robert Dowie, late minister of the Gospel, and his successors in office, for the time being, in connection with the said General Synod." No dispute existed as to the identity of the congregation and synod which at the time of the union had changed its name to that of the United Original Seceders. The opinion of the court sustains the title of the adhering minority, on a number of grounds; founded primarily on the principle that the adhering party to the original principles of the trust cannot be ousted by any act of church government, deviating from those principles. The decision further holds, that the fact of adherence throws the onus on the non-adhering party, though in the majority. The majority had contended that, "when it could not be shown that the majority in uniting, any more than the minority in resisting union, were departing from any such principle or precept, the law would not disregard, but would recognise the resolution of the majority as decisive of the right to the feudal property, held in trust for the congregation." But the court held upon the authority of *Craigie v. Marshall*, and in principle, an adhering party, majority or minority, standing where it had ever stood, and taking no steps, would not by the action of another party be placed in a dilemma of being compelled to concur in the union, or bound to show that

there was a positive adverseness between some of the doctrines of the Secession and those of the Free Church. That the standing party was not bound to risk the loss of property by taking a step into another relation, which might be doubtful; that they had a right to stand upon their own separate distinct and peculiar organization and name as a sect, as indicating their peculiar opinions, history, character, and testimony. The opinion then proceeds to show, as an additional ground merely, the difference between some of the tenets of the Secession and the Free Church.

In our own state there is no case precisely in point, but the principles ruled lead to the same result. In *Presbyterian Congregation v. Johnston*, 1 W. & S. 9, the deed of trust from the Penns was for, "the Society of English Presbyterians and their successors, in and near the Borough of York," and was made before the organization of the General Assembly of the Presbyterian Church. This congregation, before and after the deed of trust, was in connection with the Carlisle Presbytery of the Presbyterian Church, and continued until the Old and New School division. The pastor and majority of the congregation, in consequence of the conflict in the church, resolved that it was inexpedient for the present to recognise the jurisdiction of any of the conflicting church jurisdictions which may claim authority over them, but disclaimed any intention of becoming an independent authority. They, therefore, rejected the authority of the Carlisle Presbytery, and finally connected themselves with the Presbytery of Harrisburg, which was in connection with the General Assembly of the New School Church. In deciding the case, C. J. Gibson puts it on the ground that the trust must govern, and it prescribes in this case no particular connection, the General Assembly not then being in existence, and that if it had been, this is a case where the body itself falls apart, in such a way that the congregation was released from fealty to either section. In reasoning the case, he puts the point of difference between a division of one into two, and a union of two into one. He says: "Even without an express condition (in the grant) it might be a breach of the compact of association, for the majority of a congregation to go over to a sect of a different denomination, though it were only different in name. For instance, the majority

of a congregation of seceders could not carry the church property into the Presbyterian connection, though these two sects have the same standards and plan of government." This is essentially the principle of the *Thurso Case*. *Means v. The Presbyterian Church*, 3 W. & S. 303, has no special features, but establishes the principle that the trust in the title must be enforced; and that permitting strangers to it, to assist in improving the property, "would not divest the title acquired under the deed, or defeat the primary object of the grantors." *App v. Lutheran Congregation*, 6 Barr 201, is more to the point. A legacy was left to the Lutheran Congregation in Selinsgrove. A minority becoming displeased at doctrines taught by the pastor, shut the doors against him. The pastor and the majority built a new church and connected themselves with a new synod; both, however, claimed to be Lutherans. The court, Burnside, J., gave the legacy to the minority, saying: "The new church does not belong to the old Lutheran Church. It is attached to a new synod, and is not governed by the same ecclesiastical government that ruled Frederick Hawyer (the donor of the legacy) in his lifetime. I approve of the doctrine of Lord Eldon, in the case of the *Attorney-General v. Pearson*, 3 Meriv. 400; that it is the duty of the court to decide in favor of those, whether a minority or a majority of the congregation, who are adhering to the doctrine professed by the congregation, and the form of worship in practice, as also in favor of the government of the church in operation with which it was connected at the time the trust was declared." To this case we may add *Trustees v. Sturgeon*, 9 Barr 331, which though decided on the mere ground of identity of continuance, yet distinctly recognises the principle of the preceding case of *App v. Lutheran Congregation*, adopts the language of Lord Eldon, 3 Meriv. 400, as consonant to truth and nature, and explains *Presbyterian Congregation v. Johnston*, 1 W. & S., as we have done upon the express terms of the grant. The case of *Skilton et al. v. Webster et al.*, Brightly 203, decided by Judge Rogers at Nisi Prius, is too diffuse to refer to at length, but it supports the same principles in reference to the observance of the trust, and the effect of a secession from the church government to which it was subordinate, notwithstanding the seceding

party retained the same name and doctrines. The judge, after citing the case of *People v. Steel*, decided by the Supreme Court of New York, 7 P. L. J. 324, in support of these principles, says: "It is nothing to the purpose, that the defendants are numerically the majority of the corporation, nor that they remain in possession. Having separated themselves from the ecclesiastical body of the church, formed a new Presbytery for themselves, the complainants, who are adhering members, by operation of law became the incorporators, and as such are entitled to the possession."

Adherence then being the test, we come to consider the nature of the act of union, and its effects, for the purpose of determining the present existence and identity of the Associate Church, and whether in the union it still stands as the depository of its original principles and form of government, and the safeguard of the trust, or whether such a merger has taken place as to cause the loss of its distinctive name, identity, and standards. To determine this correctly, we must first examine the elements brought into union, the Associate and the Associate Reformed Church.

The Congregation of Unity, being in connection with the Associate Church, we must resort to those documents which exhibit the origin, doctrines and government of that church, and the attitude it assumed towards the Associate Reformed Church. These consist of the declaration and testimony adopted by the Associate Church at Pequa August 25th, 1784; the narrative prefixed thereto, adopted at Philadelphia October 25th, 1784; the act of the Associate Synod of Scotland, defining the connection of the Associate Presbytery of Pennsylvania with said Synod, passed at Ediuburgh May 7th, 1788, and ratified by the Presbytery of Pennsylvania November 3d, 1788; the act concerning Public Covenanting, passed at Philadelphia April 29th, 1791; the act concerning the admission of church members to communion, passed at Philadelphia April 28th, 1791; and the ordination vows, approved November 4th, 1784. The "Narrative" was approved, says the act, "both as a testimony by them to the cause and work of God in former times, and as an account, they are in duty bound to give the present and following generations, that they may not forget the works of God." From this Narra-

tive we learn that the Associate Church, which began with the secession of Erskine, Mincrieff, Wilson and Fisher, from the established church of Scotland in 1733, had its origin in the firm adherence of those men to the doctrines of the church in all their sternness and rigor, and their inflexible purpose to testify against the errors and backslidings into which the church had fallen. For this purpose they formed a solemn testimony, the chief design of which (says the Narrative) "was to express the adherence of the Associate Presbytery, and of those who joined with them, to the testimony of those who had in former times contended and suffered for the truth in Scotland; to condemn those sins and backslidings of past generations in which the present were more or less directly following them; to assert and vindicate these truths which had been slighted and denied by the judicatories of the established church; to endeavor, according to the covenanted obligations they were under, the preservation of the reformed religion in Scotland in doctrine, worship, discipline and government, to transmit the truth, in this solemn manner, to posterity, and by an open confession, to satisfy all who should inquire as to the principles which they maintain, and the foundation upon which, they, through the grace of our Lord Jesus, desired to stand." In fulfilment of these views, the Associate Presbytery of Pennsylvania passed the act just mentioned concerning public covenanting; adopting, with the changes necessary to adapt it to their circumstances, the "National Covenant of Scotland," the "Solemn League and Covenant," the "Acknowledgment of Sins," and the "Solemn Covenant Engagement unto Duties." These solemn acts were oaths, not only in spirit, but in express form. "With our hands lifted up to the Most High God we do swear." Their rigid and unbending character will be better seen in their perusal.

In the year 1743, the Associate Presbytery of Scotland, having proceeded to the "duty of Solemn Covenanting," and entered into "a bond for the renewing of these covenants," adapted to the circumstances of the times, the Rev. Mr. Nain "dissented from his brethren because they would not swear to the National Covenant and Solemn League, in the very words in which they were originally framed, and because they condemned the prin-

ciples of a party, who disowned the civil government of the country, alleging that certain religious qualifications not to be found in the rulers of Great Britain, were so essential to the being of magistracy in a Christian land, that it was sinful to acknowledge or obey those who were destitute of them; even in such things as are in themselves lawful. To this party Mr. Nain joined himself, not as appeared from a persuasion that they were in the right way, but from very sinister motives. By his assistance they constituted themselves into what they announced to the world by the name of the Reformed Presbytery." Such is the language of the "Narrative," page 81, characterizing that element entering into the Union of 1782, with the Associate Presbytery of New York, and a part of that of Pennsylvania, and constituting the "Associate Reformed Church." Of this Union the Narrative gives an account, exhibiting its attitude towards the Union in terms indicating strong repugnance, and a belief that it involved a concession of principle. According to the "Narrative" (p. 44), a scheme of Union was set on foot between these Presbyteries, New York and Pennsylvania, and the Reformed Presbytery (Covenanters), who were of the same principles with those in Scotland, just mentioned. The Union was agreed to by the Associate Presbytery of New York in 1780, and (the Narrative proceeds) at a meeting of the Presbytery of Pennsylvania, June 12th, 1782, its friends had by the casting vote of the moderator a majority in the latter. The members who voted against Union protested and appealed to the Associate Synod (Scotland); but the other party, avowing that they, as a Presbytery, did not longer acknowledge their connection with that synod as belonging to it, therefore, refused to admit of any protest, in which there was an appeal to it. Upon this the protestors, seeing the principles and constitution of the Presbytery plainly deserted by their brethren, judged it their duty to do what they could for preserving both by withdrawing, which they did accordingly, having declared in a protest that the power of the Associate Presbytery belonged to them who adhered to its principles and constitution." This course, according to the "Narrative," was approved of by the Associate Synod of Edinburgh.

The reasons of the protestors, who are, as they claim, the true and continuing Associate Church, were that the Union involved a laying aside of their public testimony for the truth; that their ordination engagements were binding on them to continue in the profession then made and in the society of their brethren, the other members of the Associated Synod of Edinburgh; that the principles of the Reformed Presbyteries about civil government were repugnant, and for denying them, the Associate Church was denounced in the testimony of the Reformed Presbytery "as teachers of false doctrine, as treacherous in covenant, as enemies of the Lord's work, as barefacedly belying the Scriptures, as guilty of a most dreadful and deceitful imposition on the generation;"—testimony never retracted; that the measures taken to establish the Union were irregular and subversive of Presbyterian order, and, adds the narrative, "the first fruits of this Union were such as manifested a change in the principles of those who had gone into it." The articles of Union, it alleged, were defective and some ambiguous. "But," it proceeds, "these soon gave way to what was still more defective and ambiguous, viz., the constitution framed by the Synod of these United Brethren, 1783. This last is one of the most dubious professions of the faith we remember to have seen made by any church. Almost every article of it is expressed in such a manner as it may be understood in different senses, and we have reason to believe it was thus framed with that very design."

Without detailing further the strong, perhaps bitter, utterances of the Narrative against the Union which formed the "Associate Reformed Church," it concludes, "upon the whole, it is absurd for any one to allege that the brethren who left us stand on the same ground they formerly did. . . They either were or are now in the wrong course."

Thus stood the Associate Church, in an attitude of invincible repugnance and irreconcilable opposition to the Associate Reformed Church, from 1784 until long after the creation of this trust in 1803. Whether the Associate Church, as the protestors claim themselves to be, is the true successor of that existing before the Union of 1782, or whether it was right or wrong in its hostility to the Associate Reformed Church, is not the question,



nor is it for us to decide upon these questions. We are only to inquire what church it was the congregation of Unity belonged to in 1808, when the trust was created, for it was to the principles of this church the trust was dedicated, and we must take it as it professes to be itself, and not as others may think it should be. It was the Associate Church, as it existed in 1808; whether it was a secession in 1782 from the Union, or was the continued Associate Church, as it claimed to be, to which the members of this congregation belonged; a church having not only the common standards of Presbyterianism, but certain superadded acts of their own contained in their declaration and testimony, narrative, acts relating to covenanting and to communion and ordination vows, which they held to tenaciously. Of these we shall speak again.

Such, then, are the elements of the Union of 1858, and such the relation which the Associate Church, by her own acts, held to the Associate Reformed Church, the other element of the Union.

We come now to the Union of 1858. A strict seceder would naturally be struck with the forbearance to be exercised towards those whose consciences would not permit them to sanction the Union on the basis adopted. The Associate Reformed Synod accepted the basis "in the confidence that any modification or amendments, necessary to harmonize said basis with the faith and practice held in common by the two churches, or to render it more entirely acceptable, will be in due time effected by the United Church, and in confidence that reasonable forbearance will be exercised towards any member of either body that may be constrained to dissent from any article in this basis." In return, the Associate Synod resolved, "that we cordially reciprocate the confidence expressed by these brethren, respecting mutual forbearance, it being distinctly understood that under the plea of reasonable forbearance no one be permitted to teach or to act in opposition to the doctrine and order of the United Church." These resolutions of 1857 are followed by the joint resolutions of 1858, consummating the Union, of which the preamble recites, "and whereas, it is agreed between the two churches that the forbearance in love which is required by the law of God, will be

exercised towards our brethren, who may not be able fully to subscribe the standards of the United Church, while they do not determinedly oppose them, but following the things which make for peace and things wherewith one may edify another."

Without questioning the wisdom or the propriety of the forbearance resolved upon by the two churches, a matter not within our province, the question is, how would the forbearance be looked upon by a rigid seceder, firmly attached to the standards and acts of his own church and determined not to depart therefrom. He would be struck with the patent fact that the Union, in the contemplation of those who formed it, was attended with such doubts and difficulties, on the very basis adopted, that provision was necessarily made against too strict an enforcement of discipline upon those who could not see their way clear under the new testimony. This, in the mind of such a seceder, was in itself an abandonment of the strictness of his tenets; order in the church and government of Christ being a part of his belief. This expressed doubt in the act of Union itself was with him a sufficient reason to reject it. In presenting thus the repugnant attitude of these two churches, and the forbearance to dissenters contained in the act of Union, it will be seen that we have done it in that light in which it would be looked upon by a seceder who adhered rigidly to the acts of his own church, the Narrative, Testimony, &c. The reason is, that each individual, in matters of conscience, must judge for himself; and he cannot be carried by the acts of others into a position which he judges to be against his religious convictions and his duty.

We are not to be understood as speaking in condemnation of the Union; far from it. The progress of the church towards unity, so far as it can be done without a sacrifice of principle or of conscientious conviction of duty, should be the desire of every Christian.

We come now to the main ground of opposition to the Union, as contended on part of the complainants. It is alleged that the "basis" is an abandonment of certain peculiar tenets of the Associate Church, and is repugnant to others. The specifications contained in these grounds are given by the Rev. McAuley, in his testimony, to the number of eleven.

Many of these specifications belong to the theologian, not to the lawyer, and, therefore, we shall not undertake to pronounce upon them. But there are certain clear and distinctive differences between the standards of the United Church and the Associated Church, which we are compelled to notice, because they form solid reasons for dissent to one who does not choose to abandon the old standards of the latter church.

The "basis" upon its face does not purport to adopt the "declaration" and "testimony," the "acts concerning covenanting" and "communion," and "ordination vows" of the Associate Church; nor even to supply them in whole. We do not mean to say that the essentials of "Presbyterianism" are omitted in the "basis," but that some of the essentials of Secederism after 1784 are. It is true, that both the Associate and United Church adopt the Westminster standards, including the Confession of Faith, Larger and Shorter Catechisms, the form of Presbyterial government and directory for public worship, which to this extent puts them upon the same foundation. But beyond this there is a large territory of tenets, and their peculiar interpretations, some of rigid character, to be found in the declaration and testimony of the Associated Church, and the other acts we have enumerated, upon which the members of that church stood as a term of communion, and which, consistently with their standing in that church, they could not abandon.

Thus the Act of August 25th, 1784, adopting the declaration and testimony of the church, declares that it contains "their views of present truth and duty, and a confession of that faith to which through the grace of our Lord Jesus they are resolved to adhere." The Act of April 28th, 1791, relating to the communion, declares, "that the profession of the faith required of those who desire communion with us shall be an adherence to the Westminster Confession of Faith, Larger and Shorter Catechisms, form of Presbyterial church government, and directions for the public worship of God, as these are received and witnessed for by us in our declaration and testimony, and also that they profess their approbation of the said declaration and testimony for the doctrine and order of the Church of Christ."

In the ordination vows the teachers of the church (ministers

and elders), are required to believe the standards of the church, "as they are received in the declaration and testimony, published in the year 1784," and to "adhere to the declaration and testimony for the doctrine and order of the Church of Christ, and against the errors of the present time."

Now whatever may be the view of those who entered the United Church, that in all the essentials of "Presbyterianism" the basis and testimony of that church accord with these former views and professions, in so much that they could conscientiously act upon this conviction; yet this is not the view of the rigid seceder who does not choose to abate a jot or tittle of his peculiar declaration and testimony. These acts of his church are a term of his communion, and they indicate his peculiar belief and contain his peculiar interpretation of the standards themselves. Even the "Narrative," though by the act adopting it not to be required as a term of communion, is such a "testimony to the cause and work of God in former times," and such "an account they are in duty bound to give, to present and following generations, that they may not forget the works of God," as the rigid adherent to the church might not be willing to abandon, it being, in his eyes, an authentic and authoritative history of his church.

If you tell him all the essentials of Presbyterianism are to be found in the basis of Union, he replies: "True, I find all the standards of the Presbyterian family there; but where are the declaration and testimony of my church, in which these standards are explained, illustrated and enforced? That testimony is a part of my faith, and was the solemn act of my church, as better adapted to the circumstances in which we are placed, and were directly pointed against the errors of the present time. It reminds me that my church is a secession church, and of its origin and faith; it was vowed unto the Lord by my teachers in the church, and I carry it with me to the table of my Redeemer."

There is a difference between the requirements of the United and Associate Churches, as to communion, which requires to be noticed. The article of the United Church simply asserts that communion should not be extended "to those who refuse adherence to her profession and subjection to her government and dis-

cipline, or who refuse to forsake a communion which is inconsistent with the profession that she makes," &c. The adherence and subjection, here referred to, are the profession and government of the United Church, which we have seen does not embrace the testimony and communion act of the Associate Church. . The terms of communion in the United Church refer, therefore, to the Westminster standards and the "basis" only. But the seceder, according to his standards, requires more; he requires a positive profession of the interpretation of the Westminster standards, as contained in the declaration and testimony of 1784, and of approbation of this declaration and testimony for the doctrine and order of the Church of Christ.

Another feature in the article on communion is that refusal to adhere, &c., is set forth as a disqualification, and is apparently negative in its character, while the Associate Church requires a positive profession of a specific kind. Now, this may not be a substantial difference, but it certainly is a seeming or formal difference, so much as to cause the weak to stumble, and hence the firm seceder might be unwilling to accept it as a term of communion.

What then was the effect of the Union upon the Associate Church, as it stood in 1803, at the time of the grant to Unity Congregation of the property in question and afterwards? It brought this church into connection, and amalgamated it with an element (the Reformed Presbytery) against which it had strongly testified as dissenting from the true secession faith, and which had not retracted its charge against the Associate Church of a violation of its covenant oaths, and of belying the faith, and amalgamated it with that portion of the Associate Church, which went into the Union of 1782, and against which it testified as departing from the true secession faith, and being in the wrong course. It brought it into connection and amalgamated it with the Associate Reformed Church, which was formed by the union of these two elements, and against which, as a new body, it also testified. It merged the Associate Church into a new church, under a new name, depriving it thus of its identity in name and distinct existence; whereby its origin, its efforts in the cause of Divine truth, and its peculiar character, became lost and were

buried beneath the foundation of a new superstructure. It relaxed the rigid discipline of the Associate Church by the provision for forbearance, adopted as a condition of Union. And, finally, it deprived it of those acts and testimonies which were its peculiar standards, distinguishing it from other members of the Presbyterian family.

Now all this may have been right and wise for aught we know, and no doubt was conscientiously acquiesced in by those who went into the Union. But that is not the question here; the question here is one simply of fact, not of property, whether there has been a substantial yielding up, in the act of Union, of these distinct features in name, tenets and identity of the Associate Church, as characterized its members as a peculiar people, and were the objects of the trust estate, for the advance of which the trust was declared. For if it be decided that the church property follows that portion of this congregation which went into the Union, and if the Union is in fact a yielding up of some of the principles of doctrine and government, for the benefit of which the trust was created; then those who have refused to go into the Union, must either follow the property into the Union, in order to preserve their rights of property, or by staying out, in obedience to their conscientious convictions of duty, lose these rights of property. This presents the simple question, whether they must violate their consciences to preserve their property.

The law answers this with an emphatic—No. The trust was not made for the church at large, but for this particular congregation. The church had no hand in creating it. Those who were the immediate parties to it, established it to advance the principles of faith and church government then existing. Those who hold to these principles are the persons who have the civil right. It is not in the power of the church government, by any change it may make in these principles, to draw the trust after it, if those interested in it do not choose to follow, and those who do follow, even though a majority, cannot draw after them those who choose to stand where they ever stood; for with them it is a standing still for conscience sake.

Whether in so standing, the minority of this congregation did so from conscientious convictions of duty, or from baser motives,

as alleged by the respondent, we cannot decide. That must be referred to their Maker, who will judge them of their conscience. It is sufficient that they have a ground, in the departure of the church from them, upon which they may conscientiously stand, if they will, and say they will stand where they always stood; "resolved (in the language of the ordination vows) through grace to endeavor faithfulness in adhering to the testimony maintained by the Lord's witnesses for these Reformation Principles we profess, in contending earnestly for the faith once delivered to the saints, and in attending to all these duties which the Lord has enjoined upon us, and which we in this church are by these our covenant engagements, bound to perform." It is true the church may by her government, and in the progress of her attainments, change her tenets, and cut them off by her discipline, if they refuse to follow; but she cannot, by such change, alter the terms on which the trust in the title was created, without their consent; and in cutting them loose from her, for their adherence to the old tenets, she also cuts loose the property from her control.

For these reasons we are of opinion that the minority of this congregation were not bound to give into the Union, and that the acts of the church government and of a majority of the congregation were not competent to carry the property into the Union with them; that by these acts the church relation on which the right of property was formed, was changed, and the minority, who chose to stand fast and adhere to that relation, as it before existed, were left the rightful owners, and as such are entitled to regain possession.

For the benefit of those interested, we have written more at large than might be needful for the judicial mind. It will be seen that the case is put, not on the want of power or propriety in the churches to effect the ecclesiastical Union, but upon their incompetency by such act to change the relation upon which the trust or civil right depends. It will be noticed, also, the nature of this relation of the Associate Church to the trust, requires us to speak from the stand-point of that church in 1803, when the trust arose, and to view the opposite element of Union in 1858 (the Associate Reformed) as she did.

With the merits of the ecclesiastical controversy we have nothing to do, and pronounce no opinion upon it.

The solicitor of the complainant will draw up the form of a decree and serve it on the opposite solicitor, in accordance with the equity rules.

In Western Pennsylvania, the *locus in quo* of this controversy, as well as many others depending upon it, this case was one of great interest to the profession, many still thinking that the court below was not in error. However, the decree was reversed in the Supreme Court, 5 Wright 9, the opinion by Lowrie, J. See also *Sutter et al. v. The Trustees, &c.*, 6 Wright 503.

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*In the United States Circuit Court for the Western District of Pennsylvania.*

SANDERS v. LOGAN, ET AL.

(Vol. VIII., p. 361. 1861.)

1. The Circuit Court of the United States, having jurisdiction in equity of controversies arising under the United States Patent Laws, do not act as ancillary to a court of law, and therefore, do not require the patentee first to establish his legal right in a court of law, and by the verdict of a jury.
  2. Where the injury done to a patentee by infringement of his patent is not in the use of his invention, but in making use of it without compensating the patentee therefor, it being the interest of the patentee that his invention should be adopted and used by all, the measure of "actual damage" is the price or value of a license to use it.
  3. In such cases, the measure of damage being a certain sum, an account of profits is not required, and the jurisdiction of a chancellor need not be invoked.
  4. Injunction is not the proper remedy in such cases. It is a remedy used only for prevention and protection, and not to enforce the payment of money, nor for extortion.
  5. A court of law may treble a verdict for "actual damage" in a patent suit, where the defendant has acted wantonly or vexatiously, but a court of equity can inflict no exemplary or punitive damages, as a court of law may.
  6. The use of several machines in public, for more than two years prior to applying for a patent, although slightly varying in form and arrangement, yet substantially the same as afterwards patented, cannot be alleged to be experimental, so as to avoid the legal consequences of such prior use.
  7. The obvious construction of the seventh section of the Patent Act of 1839 is, that a purchase, sale or prior use, within two years before applying for
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a patent, shall not invalidate, unless it amounts to an abandonment to the public.

8. Abandonment may take place within two years prior to the application for a patent.

BILL in equity filed by Benjamin D. Sanders against John T. Logan and others, for infringement of letters patent granted to complainant for improvement in winnowing machines, issued 19th June, 1849, and re-issued April 10th, 1852, praying for injunction to restrain the defendants from further use of said improvement and for an account, &c.

The defendants' answer alleges that the patent is void, first, for want of novelty; second, by reason of public use, by patentee and others, for more than two years prior to the application for a patent; third, by reason of abandonment prior to the application; fourth, prior description of the alleged invention in public printed works; fifth, that the patentee was not the inventor. The answer also denies the infringement.

The nature of the invention and the claims are set forth in the opinion of the court.

On the plea denying the infringement, the respondents showed that in their machines the vertical blast spout, in which the grain is cleaned, is of the same dimensions throughout, and that the blast spout in their machines does not communicate with the atmospheric current through a screen; and, therefore, they claimed that they did not use the combination set forth in the complainant's patent.

In proof that the subject-matter of the third claim of complainant's re-issued patent was not new at the time of his alleged invention, they offered in evidence the following patents, viz.: Orrin Lull's smut machine, patented 6th April, 1843; James Coppuck's grain-cleaning machine, patented 24th April, 1841; Phillips & Jackson's winnowing machine, patented 4th May, 1841; Joseph Johnson's smut machine, patented September 9, 1845.

Hon. *E. M. Stanton* and *James A. Lowrie*, for complainant.

*W. Bakewell* and *George Shiras*, for respondent.

The opinion of the court was delivered at Pittsburgh, May 13, 1861, by

GRIER, J.—The complainant alleges in his bill that he is the original and first inventor and patentee of “a machine for winnowing and cleaning grain of chaff, smut and other impurities.” His original patent was dated 19th June, 1849. It was afterwards surrendered and a new patent granted, with an amended specification, on the 10th April, 1855. The bill prays for an injunction and an account, and yet, admitting the validity of the patent and its infringement by respondents, it is clear that as a proper remedy for the injury complained of, neither an injunction nor an account is necessary or proper. The invention claimed is for an improvement in the machinery of grist mills, and the only injury to plaintiff’s rights consists not in using his invention; for, it is his interest that all mills should adopt and use it, provided he is paid the price of a license. Such price or value of a license, is the true measure of the “actual damage” suffered, and of the remedy which the patentee can obtain or has a right to claim in equity. A court of law may treble such a verdict when the defendant has acted wantonly or vexatiously. Where the measure of damages is a certain sum, and does not require an account of profits the peculiar jurisdiction of a chancellor is not needed for that purpose. The remedy by injunction is neither necessary nor proper to enforce the payment of money. It is true that injunctions are now more liberally granted than in former times, yet the granting or refusal of them rests in the sound discretion of the court. A rash or indiscreet exercise of this power may be very oppressive—of no use to the complainant and ruinous to the defendant. As a remedy it should be administered only for prevention or protection. Where it is not necessary for these purposes it is merely vindictive, injuring one party without benefit to the other. There are many cases of patents where it is the only efficient remedy to protect the patentee and prevent continuing trespasses on his rights. But there are others in which it answers neither purpose, and is only used for extortion or vengeance. A chancellor who would issue an injunction to stop a mill or manufactory, locomotive, or steam engine, because in their construction some patented device or machine

has been used, would act with more than doubtful discretion. Stopping the mill or steam engine might inflict irreparable injury, but would not benefit the inventor. The compensation to him for this trespass on his rights is the price of a license. The wrong done him is not for the use of his invention, but the non-payment of a given sum of money. To issue an injunction in such a case, where neither prevention nor protection is sought or required, but only compensation, would be an abuse of power. An injunction is not to be used as an execution or for extortion.

The Circuit Courts of the United States have jurisdiction of controversies arising under the patent laws by direct grant from Congress. They do not merely act as ancillary to a court of law; and, therefore, do not require the patentee to establish his legal right in a court of law, and by the verdict of a jury. There has been no objection interposed to the jurisdiction of the court in this case, nor do I wish to be considered as deciding that the court has no jurisdiction, but rather as suggesting to counsel whether they have chosen the proper tribunal, when the bill exhibits a case where neither account nor injunction is the proper remedy, but only a decree for a certain sum of money, with interest, as fixed actual damage. A court of equity can inflict no exemplary or punitive damages as a court of law may. Hence the party may have better remedy in a suit at law.

The complainant's patent gives the following general description of the nature of his invention:—"The nature of my invention consists, first in separating chaff, smut and other impurities from grain, by subjecting the same to a blast within a vertical spout, as will be hereafter shown, whereby the sound grain by its superior gravity is prevented from being carried upward by the blast or current of air, and at the same time the impurities which are light follow the current, and are drawn through the fan-box and discharged through the longitudinal trunk of the same, the light or imperfect grain being carried upwards and lodged within a hopper at the lowest part of the horizontal trunk. My invention also consists in the combination of vertical blast spouts, screen, hopper and fan arranged and operated as will be hereafter shown and described."

The claim set forth in the original patent of 1849 is a correct description of the whole invention. It is as follows:

“What I claim as my invention is the trunk F, gradually enlarged, from below upwards, and communicating with the atmospheric current through the screen H, in combination with the hopper E, and the fan, placed at the end of the opposite vertical trunk D, to separate the chaff and other impurities from the grain in the manner, substantially, as herein described.”

The amended patent of 1855 describes the same invention with immaterial variations, or more minute directions as to size and shape.

The chief difference is, that the claim of the last is made broader than that of the original, whether better may be doubted. It is as follows:

“First. The employment or use of a vertical blast spout F, gradually enlarged from its lower to its upper end, so that the strength of the blast is decreased in the upper portion of the spout, owing to the increased space or area of the spout, for the purpose of preventing any sound or perfect grain being carried with the light foreign matter, over the upper edge of the spout, the blast being formed or generated in said spout in any proper manner.

“Second. I claim the blast spout F, either gradually enlarged from below upwards, or of the same dimensions throughout, and communicating with the atmospheric current through the screen H, in combination with the hopper E, and the fan placed at the end of the opposite vertical spout D, to separate the chaff and other impurities from the grain in the manner substantially as herein described.

“Third. I claim the employment or use of a vertical blast spout, either gradually enlarged from below upwards, or of the same dimensions throughout, when said blast spout is so arranged, that the grain is cleaned or separated from impurities within said vertical spout.”

The answer of repondents alleges:

First, That complainant was not the original and first inventor of the machine or combinations of devices claimed as his invention.

Second, But admitting him to be so, he had abandoned his invention to the public prior to the application for a patent.

Third, That the invention was in public use, with knowledge and consent of complainant, more than two years previous to his application for a patent.

Fourth, That the machine used by defendants does not infringe the rights of complainant."

If any one of these allegations be established by the evidence, the respondents are entitled to a decree.

I see no reason to doubt that the plaintiff is the original inventor of the device of the first claim, and also of the combination claimed in the second, notwithstanding the valuable suggestions and assistance rendered to him by his partner, Justus, in perfecting his machine.

The third claim is too broad. The vertical spout had previously been used in the same way, in other machines invented and patented for the purpose of cleaning grain from its impurities; it is to be found in Lull's smut machine, patented in 1843, and in some others.

Sanders made his first machine in 1844. It embodied the ideas of his subsequent patent as to the combination of devices to be used, though differing somewhat in arrangement and form. He had put it into operation in Hugh Rylands' mill in Virginia. Afterwards in September, 1855, when he was in the employment of Justus, with whom he had first learned his trade of millwright, and assisting him in his erecting the machinery of Davis' mill, he informed him of the machine he had put in operation in Virginia. Justus seized upon the ideas suggested by Sanders, made plans and a model, improving upon them, and erected the machine, substantially, as it was afterwards patented, in Davis' mill. This was in December, 1845. In July, 1846, Justus erected one of these machines for Crawford. In September, Justus and Sanders entered into partnership as millwrights. Sanders suggested that they should take out a joint patent for the invention. Justus said that he thought it did not deserve a patent, there was too little to be patented. They then proceeded to put these machines in every mill which they were employed to erect during their partnership, which was dissolved in 1848,

They considered the machine as completed by the joint invention and freely gave it to the public till November 30th, 1848, when Sanders entered his claim for a patent.

It is clear, therefore, that assuming that Sanders was the sole inventor of the machine as perfected in 1845, with Justus' assistance, yet that he was not entitled to a patent for the same. The evidence established a clear case of abandonment, and moreover that the invention was publicly used, with the knowledge, consent and approbation of the complainant, more than two years previous to his application for a patent. The allegation that these machines were made and incorporated into so many mills all over the country, for the purposes of experiment, is too absurd to be entertained for a moment.

By the Patent Act of 1836, a use of an invention by a single person, or a sale of the thing invented to a single person, might amount to such a public use, with consent and allowance of the patentee, as would forfeit his right to a patent.

The 7th section of the Act of 1839 provided a remedy for cases where the conduct of the party did not show an actual abandonment. It secures the right of those who may have purchased or constructed any newly-invented machine prior to the application for a patent. It provides that "no patent shall be held to be invalid by reason of such purchase, sale or use prior to the application for a patent, except on proof of abandonment of such invention to the public; or that such purchase, sale or prior use has been for more than two years prior to such application for a patent." The obvious construction of this section of the act is, that a purchase, sale or prior use shall not invalidate, unless it amounts to an abandonment to the public. Although I am of opinion that the evidence exhibits a clear case of abandonment, as distinguished from "the purchase, sale or prior use," which is tolerated for two years, it is not necessary to rest our decision on that point alone, or to attempt to draw a line of distinction which might be applicable to other cases. The prior use has been proved to have existed more than two years before application for a patent.

As I think the respondents have supported this plea, they are entitled to a decree. I need not, therefore, enlarge upon the

plea denying the infringement, further than to say, I think the respondents would have been entitled to a decree in their favor on that point also.

The bill must be dismissed with costs.

*In the Court of Common Pleas of Erie County.*

COMMONWEALTH EX REL. v. THE BANK OF COMMERCE.

(Vol. VIII., p. 382. 1861.)

1. The 27th section of the General Banking Law of Pennsylvania of 16th April, 1850, is technically a penal statute, and is to be strictly construed.
2. To authorize the court or a judge to decree an assignment by the directors of a bank under the 27th section of the Act of 16th April, 1850, it must appear that the financial officer of the bank not only refused to pay its notes or certificates in gold or silver, on demand, but that he also wilfully refused to endorse on them the day and year when they were presented for payment, or refused to give a certificate for money deposited in the bank.

*Vincent*, for relator.

*Galbraith* and *Grant*, for respondent.

The facts of the case fully appear in the opinion of the court, delivered February 1, 1861, by

JOHNSON, J.—This is a proceeding under the 27th section of the Act of 16th April, 1850, commonly called the General Banking Law, to compel the Bank of Commerce to make an assignment to trustees, and thus work a forfeiture of its charter. The evidence presented, and admitted by respondent, shows that on the 21st day of December, 1860, the relator, “presented \$1135 of the circulating notes of the bank at the counter, during banking hours, and demanded payment in coin, and that payment thereof was refused by the bank.” It was further admitted, to be used as evidence, that the proper officer of the bank offered at the time to make the endorsement required by the 25th section of the same act, but that it was not desired by the relator.

Under this state of facts, it is claimed by the relator that the bank is subject to the decree contemplated by the 27th section

of the act, requiring the directors thereof to execute "a general assignment of all the estate, real and personal, of the bank to such person or persons as they may select, subject to the approval of the Court of Common Pleas."

This section is essentially and technically a penal statute, and requires in its construction the application of different rules from those that obtain in the interpretation of those statutes termed remedial. So far as known to this court, it has received no authoritative construction. Let us see, then, what it requires, and what power it vests in the court or a judge, under a proceeding of this kind.

The 24th section declares "a failure or refusal to redeem its notes, and pay its liabilities in gold and silver, upon demand being made at the banking house of said bank, during banking hours, an absolute forfeiture of the charter." This result can be worked out by a proper proceeding instituted by the attorney-general.

The 25th section requires two things: first, that the cashier of any bank refusing to pay specie on demand for its liabilities, shall, when required, give a certificate of the time and amount of the deposit to any person making a deposit; and, second, that the president and cashier of the bank at the time of demand being made for payment of any note, bill, or obligation, or money deposited, the payment of which in gold and silver shall have been refused, shall make an endorsement thereon, setting forth the day and year of such demand, and subscribe his name thereto; and inflicts a penalty on such officer for a refusal so to do.

This proceeding is authorized by the 27th section, to be instituted upon affidavit that said bank has refused to redeem any of its obligations, on demand, in gold and silver coin; and, after directing as to the preliminary proceedings, then further enacts that "upon the hearing of the parties, if the said court or judge shall be satisfied of the truth of said complaint, and that the provisions of the 25th section of this act have been wilfully violated, then the directors of said bank shall make and execute, under their corporate seal, a general assignment, &c.

I have examined the Pamphlet Laws of 1850, and could find there no evidence of a misprint of this section, as quoted. If it



had said the 24th, instead of the 25th section, although redundant, its provisions would have been consistent and self-sustaining. The consequence is, the different and incongruous sections of the act are so framed as substantially to neutralize each other. Before the bank can be compelled to make an assignment, it must be shown that payment of some of its obligations in gold or silver coin has been demanded and refused; and, further, that the financial officer has wilfully refused, on demand, to give a certificate to a depositor, or refused to endorse the obligation or certificate presented, with the date of the demand, and sign his name thereto. This is just what the evidence in this case does not show, and just what no president or cashier would ever refuse to do.

It can hardly be supposed, consistently with a proper respect for the intelligence and integrity of the legislature, that the real intention of the law-makers is contained in these enactments. But the court is powerless. It can neither make, mend, nor modify penal statutes.

That this statute is of this character, there can be no doubt, from the forfeiture of the corporate franchise, which it imposes in the contingency of an assignment, and the adjudications of the courts in analogous cases. A similar provision was contained in the 7th article of the charter granted by the legislature to the United States Bank in 1836, except that it required the court or judge to take the evidence of the demand and refusal to pay specie, and transmit it to the governor, who was, by proclamation, to declare the charter forfeited.

A proceeding like this having been instituted before the Court of Common Pleas of Philadelphia, against the bank, the unanimous opinion of all the judges, King, Randall and Jones, declared the act a penal one, and that "the forfeiture is either a penalty to enforce a private claim, or the refusal to pay a single note, being a wrong to the public, it is the punishment of the wrong." *Kuhn v. United States Bank*, 2 Ash. 174.

Analogous to this, is the ruling of the court in *The Mayor v. Davis*, 6 W. & S. 269, in which it is decided that "so far as statutes for the regulation of trade impose fines and create for-

feitures, they are to be construed strictly, and not liberally, as remedial laws."

This same 27th section, upon which this whole proceeding is founded, provides "that the corporate powers of the bank shall, after the making of the assignment, cease and determine, except so far as may be necessary," &c., for certain purposes specified, relating entirely to the winding up of its affairs.

Our own statutes are to be interpreted and administered, as near as may be, according to the principles of the common law. So say the Supreme Court, in 8 Watts 518, and 10 Watts 224. Every lawyer knows what these principles are, as applicable to the construction of penal statutes. We are asked to force this bank into liquidation, in disregard of the statute, upon evidence that disproves the commission of those acts that authorized the infliction of such a penalty.

Adopting the rules of construction applicable to such cases, as we feel bound to do (although our personal predilections would have been better satisfied with a different result), we are constrained to deny this application, and dismiss the proceedings at the cost of the relator.

Decree accordingly.

s. c. 9 Am. L. R., O. S. 379; see *Commonwealth ex rel. Gray & Farrar v. The Bank of Commerce*, *infra*.

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*In the Common Pleas of Luzerne County.*

McCOWAN v. WARD.

(Vol. VIII., p. 385. 1861.)

There is nothing in the statute authorizing a justice of the peace to ascertain the amount of a claim without testimony, unless on the admission of a defendant. The non-appearance of a defendant authorizes a judgment by default, but still the plaintiff must prove his claim.

CONYNGHAM, P. J.—We do not see how this judgment can be sustained without the violation of important principles. The justice returned that judgment was given by default against the

defendant, for the claim of the plaintiff, the value of a wedding shirt, and costs. If the record so stood alone, we would be disposed to support the proceeding, upon the rule that, if possible, the proceedings of a justice are to be sustained, and every reasonable intendment therefor made, without regard to form; presuming in such case that the value of the shirt, &c., was made out by testimony, though it was not mentioned. But the justice in this case enters upon his docket by amendment, as we infer, supplying what he must be supposed to have considered an omission, that "no evidence was given by either party," and then certifying as returned to us, that the transcript "was a correct transcript of the proceedings in the above suit, and of record on my docket." Can we sustain a judgment for any ascertained amount, where such amount was ascertained without evidence, and evidently merely therefore from the fact that the plaintiff stated such to be his claim.

If it had been stated on the docket, that the amount of the claim or the claims was proved by the oath of the plaintiff, unless it had been founded on a book account, when we would have presumed he had legally testified to his book, we should have to reverse a judgment. Can we give more effect to his mere statement?

There is nothing in the statute authorizing a justice to ascertain the amount of a claim without testimony, unless on the admission of a defendant. The non-appearance of the defendant authorizes a judgment by default, but still the plaintiff must make out the amount of his claim. A default in its extent, if it can go so far, would be no more than a default in court, which without special rules requires a writ of inquiry to establish the amount and perfect the judgment.

It is said that the practice prevails among justices, if a defendant does not appear, to give judgment by default for any sum the plaintiff may claim. If so, this is all wrong and ought to be corrected. No judgment should be entered without a hearing; and this means, the examination of the testimony of at least the one party present. Such is the spirit of the Act of 1810 in all its parts. The justice cannot be an agent of the plaintiff, and if the defendant be not present, take the previous representations

of plaintiff as correct, and enter judgments upon them. It would be wrong for a higher court to do so ; though under established rules, when the demand of a plaintiff is upon written evidence of indebtedness, as a note, &c., or on a book account, and is set out upon the record, before the time of default, and judgment asked for, to consider the default an admission of the indebtedness of the claim. There is, however, no such practice before a justice, for really, there is no such thing as an interlocutory judgment before him ; it would be a correct practice for a justice, we should think, after the time for the defendant's appearance has gone by, to give the plaintiff a brief hearing of his evidence, and then enter the judgment as by default.

We do not mean to say, that if the justice should set out on his docket the substance of the testimony, we will retry the case on the facts ; but when he states that no evidence was given by either party, including the plaintiff, as a matter of course, and the defendant not present, the very foundation of any judgment he can enter is taken away.

We think there is an error in this case, because, as we consider it, the justice, on the day after the regular hearing, amended his docket, by setting forth, that the judgment was ascertained, the defendant being in default, without any evidence before him at all, either proving the cause of action, or the value of the article. It is probable no more was claimed than perhaps it was really worth, but this will not affect the principle. The defendant, though not present, had the right to suppose the justice would dispose of the case legally on evidence. The justice was not bound to make this amendment ; but if he believed he had reason to suppose he might have done wrong in disposing of the case without evidence, he acted but fairly and honestly in making the amendment, so that the question might be tried in this court. This, we presume, was the object of the amendment.

We have thus put down our opinion at length, that our decision may not be perverted or misreported by verbal reports.

If the justice sets forth on his record that the judgment was entered by default, and an amount appears to be ascertained, we shall always presume it to be done correctly upon evidence ; but

if he says in his docket, "judgment in default, and no evidence produced by the plaintiff, or either party," we shall feel ourselves called upon to reverse an ascertained and calculated judgment.

*Sharpe v. Thatcher*, 2 Dall. 77; *Vansciver v. Bolton*, Id. 114.

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*In the Common Pleas of Centre County.*

BURNSIDE'S CASE.

(Vol. VIII., p. 393. 1861.)

Where stay of execution has been obtained under the Act of 1836, by giving security, a further stay under the Act of 21st May, 1861, cannot be had, unless the present surety bind himself in such way as effectually to preserve unimpaired all the rights and legal remedies of the plaintiff against him under his recognisance.

LINN, J.—On the 1st day of June, 1860, Reynolds & Co. obtained a judgment in an amicable action of debt, in the Common Pleas of Centre county against Daniel Irvin and Thomas Burnside for \$1302 39. On the 13th day of the same month, the defendants gave bail for a stay of execution under the Act of 1836, which stay will not expire until the 4th Monday of August next. Thomas Burnside, one of the defendants, now (June 22, 1861) applies by petition for a further stay under the Act of 21st May, 1861. This application is resisted by the plaintiffs, on the ground that a stay having already been obtained by the defendants under the Act of 1836, by giving security, the surety is bound by the terms of his recognisance to pay the judgment on failure of the defendants to make payment, at or before the expiration of the stay, and that a further stay of execution, such as is prayed for in the petition, would impair the obligation of the surety's contract, and hence an extension of the Act of 1861, by construction, to a case like the present would be unconstitutional. It seems plain to us that the effect of granting this petition unconditionally would be to impair, if not to destroy the obligation of the recognisance; for a release of the principal, or an authoritative suspension of legal remedies

against him, would release the bail. An essential part of the surety's undertaking is that the principal debtors shall pay the judgment when the stay runs out. Now if the creditor by any binding contract, or the law in the exercise of its authority, relieves the defendants from their obligation to pay at the period stipulated, and postpones payment until a future day, it is quite apparent that the surety would be no longer bound by a recognisance, the condition whereof is that the defendants shall perform an act from which they have been excused by the agreement of the creditor or the supremacy of law: 2 Bl. Com. 340. A construction of the Act of 1861 that would lead to such a result, would be plainly in violation of the 10th section of the 9th article of the Constitution, which prohibits the several states from passing laws impairing the obligation of contracts. A proposition so manifest needs not the aid of authority, and if such consequences are to flow from granting the petition it must be refused. If we pay regard to the plain and unequivocal language of the statute and consider the causes which impelled the legislature to afford this measure of relief to a community extensively engaged in enterprises that involve a large number of citizens in a general indebtedness, which is to some extent the result of our too liberal credit system, we are forced to the conclusion that the intention was to grant to all debtors a respite and a refuge from the pursuit of their creditors for one year, upon such terms and conditions as the act prescribes. Whatever errors the legislature may have committed in some of the provisions of the statute gotten up and passed in the hours and excitement of the recent extra session, the general design of the act is eminently humane and proper, and its provisions and directions should be carried out by courts and judges and magistrates in the spirit of liberal benevolence which gave it birth. But whilst we pay due regard to the manifest intention to shield the unfortunate debtor from the unrelenting rapacity of his creditors, care must be taken that we do not trench upon rights secured by the Constitution, that must not be abridged or impaired by legislative enactment.

A statute which is constitutional on its face and in its general tenor and design, may be unconstitutionally administered. We

need no better illustration of this principle than that afforded by the case in hand, were we to grant this petition without limit or qualification. The Act of 1861 provides that a stay of execution shall be awarded on all judgments remaining unsatisfied, or which may be obtained within six months after its passage; and by the 4th section the provisions of the act are made to apply to all judgments in which a sale by judicial process has not been actually made. That these general provisions are not in themselves unconstitutional may be inferred from the cases of *Chadwick v. Moore*, 8 W. & S. 49, and *Chaffee v. Michael*, 7 Casey 282. If, then, the act be in itself constitutional, it is our duty faithfully to carry it out, so as to give the relief that it is intended to afford, wherever it can be done without infringing upon vested rights in applying it to particular cases. Can we do so here? The petitioner claims the benefit of the act as a judgment debtor. The plaintiffs resist his application, because the liability of the surety will be impaired. Admitting the reasonableness and force of this objection, the petitioner proposes that in addition to furnishing real security, as directed and specified in the 1st section of the act, he will procure and place on file an instrument in writing, under the hand and seal of the surety, by which he will engage to abide by and perform the condition of his recognisance, notwithstanding the granting of a further stay. This would seem fully and fairly to obviate the objection, by preserving the recognisance in all its original force and vigor. Supposing this to be done in such way as will effectually preserve unimpaired and undisturbed all the rights and legal remedies of the plaintiffs against the present bail, we cannot see anything to prevent the petitioner from claiming a stay of execution under the Act of 1861, which is accordingly awarded to him, upon his causing to be executed, approved by the court or a judge thereof, in vacation, and placed on file in the prothonotary's office, an instrument of writing, under the hand and seal of the present surety, by which he will become bound to the plaintiffs, that in the event a further stay is granted, as provided for in this petition, he will stand to, abide by and perform all and singular the conditions and obligations of his recognisance, entered into on the 13th of June, 1860, in the same manner and

with like effect as though such further stay had not been granted ; we being of opinion that the petitioner is seised of real estate within Centre county, subject to be sold for the payment of said judgment, worth, at a fair valuation, a sum sufficient to pay and satisfy the same, over and above other encumbrances, and the amount exempt by law from levy and sale on execution.

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*In the District Court of Allegheny County.*

ROBINSON v. THE O. & P. RAILROAD COMPANY.

(Vol. VIII., p. 410. 1861.)

Property in the hands of a receiver appointed by a court of chancery is not liable to seizure and sale under execution on a judgment at law.

RULE to show cause why levy, &c., should not be set aside.

*Hampton*, for the rule.—1st. That the property levied upon is the general business office of said companies in the city of Pittsburgh, is necessary and convenient for the management of the affairs of said companies, is part of said railroads, and as such is not the subject of levy and sale under the law of Pennsylvania. 2. That all the rights, powers, privileges and liabilities of said Ohio and Pennsylvania Railroad Company were by the joint legislation of the states of Ohio and Pennsylvania transferred to, and vested in the Pittsburgh, Fort Wayne and Chicago Railroad Company, prior to the making of the levy in this case; and that prior also to the same, the property in dispute, and all other property of said Pittsburgh, Fort Wayne and Chicago Railroad Company, was given into the custody of a receiver, under an order of the Circuit Court of the United States for the Northern District of Ohio, and said receiver (W. B. Ogden) was duly recognised as such in the state of Pennsylvania, by an order in equity of the Circuit Court for the Western District of Pennsylvania, and entered into possession of the property levied upon, and has ever since been in the possession thereof. That by reason of the



appointment of said receiver, and his having the custody of said property, he cannot be disturbed in the enjoyment thereof by a sale.

Cited 16 sec. of Gen. Railroad Law of Ohio, p. 12; *Ammant v. T. R. Co.*, 18 S. & R. 210; *Canal Co. v. Bonham*, 9 W. & S. 27; *Monaghan v. Philadelphia*, 4 Casey 210; *Coe v. Pennock & Hart*, 6 Am. Law Reg. 27; *Albany City Bank v. Schemmerhorn*, 9 Paige Ch. 472; 8 Paige 338; 9 Vesey 335; 7 Paige 513; *Reed v. Penrose's Exrs.*, 12 Casey 227.

*Mr. Shaler, contra*, cites *Young v. Taylor*, 2 Binn. 227; *Harrison v. Waln*, 9 S. & R. 318; 5 Selden (N. Y.) 142; *Hubbard v. Guild*, 2 Duer 685; U. S. Ann. Dig. vol. 9, 227, § 524; *Wiswall v. Sampson*, 14 How. 52.

The opinion of the court was delivered, July 1861, by

WILLIAMS, A. J.—This is a rule to show cause why the levy, condemnation, and all subsequent proceedings thereon should not be set aside.

The facts material to the determination of the question raised by this rule are as follows:

On the 2d of May, 1856, James Robinson, the plaintiff, instituted an action of assumpsit in this court against the Ohio and Pennsylvania Railroad Company, and on the 20th of October, 1857, obtained an award in his favor against the said company for the sum of \$6728; upon which a writ of *fi. fa.* to November Term, 1860, was issued, and on the 16th of October, 1860, by virtue of said execution, a levy was made on a lot of ground situate on the north side of Fifth street, in the third ward of the city of Pittsburgh, having a three story brick building erected thereon, which was condemned by the sheriff's inquest on the 27th of December, 1860, and thereupon a writ of *vend. ex.* was issued to January Term, 1861, for the sale thereof.

The property levied on was purchased by the Ohio and Pennsylvania Railroad Company, for the purpose of establishing therein a general office for the transaction of its business, and at the date of the institution of the plaintiff's action was occupied as the principal office of the company, with the exception of the cellar

and first floor, which had been previously leased to Robinson & Co. for a carpet store, and who are still the lessees thereof.

By articles of agreement bearing date the 6th of May, 1856, ratified by the Ohio and Indiana Railroad Company, June 24th, 1856, by the Fort Wayne and Chicago Railroad Company, June 26th, 1856, and by the Ohio and Pennsylvania Railroad Company, the 2d of July, 1856, the said companies, in pursuance of Acts of Assembly of the several states by which they were incorporated, were consolidated under the name and style of the Pittsburgh, Fort Wayne and Chicago Railroad Company, and the title to the property levied on (*inter alia*) thereby became vested in the said Pittsburgh, Fort Wayne and Chicago Railroad Company, subject to the debts, liabilities, and duties of the Ohio and Pennsylvania Railroad Company to the same extent as if said debts, liabilities and duties had been contracted by the said Pittsburgh, Fort Wayne and Chicago Railroad Company. Upon the ratification of the agreement for the consolidation of the several companies as aforesaid, the Pittsburgh, Fort Wayne and Chicago Railroad Company took possession of the property levied on and occupied the same, with the exception of the part leased to Robinson & Co., as its principal office, and continued to occupy the same until the 18th of January, 1860, when William B. Ogden, who had been appointed receiver of said Pittsburgh, Fort Wayne and Chicago Railroad Company by the Circuit Court of the United States for the Northern District of Ohio, and also by the Circuit Court of the United States for the Western District of Pennsylvania, in certain proceedings in equity in said courts against said company at the suit of certain creditors thereof, took possession of the lot and building levied on, together with all the other property, real and personal, belonging to said company, and at the date of the levy in this case had, and still has, the custody and possession of said property as receiver as aforesaid, and occupies the same as a principal office for the transaction of the company's business.

Is this property liable to be seized and sold on plaintiff's execution while it is in the custody of the receiver? Under the proviso in the consolidating acts the plaintiff's judgment must be regarded and treated as a judgment against the Pittsburgh, Fort

Wayne and Chicago Railroad Company, and his right to seize and sell the property levied on is the same as it would be if his judgment and execution were directly against this company. Is the property then liable to seizure and sale on a judgment and execution of this court while it is in the possession of the receiver appointed by the Circuit Court?

The case of *Wiswall v. Sampson*, 14 How. U. S. 52, is decisive of this question. It was there ruled that where real estate is in the custody of a receiver, appointed by a court of chancery, a sale of the property under an execution issued by virtue of a judgment at law is illegal and void, and passes no title to the purchaser. A mortgagee or judgment creditor having a prior lien on the property, if desirous of enforcing it against the estate after it has been taken into the care and custody of the court by the appointment of a receiver, must first obtain leave of the court for this purpose, and the court will permit him to be examined *pro interesse suo* and direct a master to inquire into the circumstances, whether his judgment is an existing unsatisfied demand, or as to the priority of the lien, &c., and take care that the fund be applied accordingly. Where the law gives priority of lien it will be protected and preserved in chancery. The plaintiff, therefore, if his judgment is a prior lien on the property, is not without remedy, as the case cited clearly shows. It may be that a sale on his writ would occasion no interference with the possession of the receiver, and no contempt of the authority of the court by which he was appointed, but this court having the control of its own process ought not to permit it to be used for an illegal and void purpose, and the rule must, therefore, be made absolute.

This view of the law renders it unnecessary to consider the question presented by the facts of this case, viz.: Whether under that provision of the defendants' charter, which makes it the company's duty to establish a principal office at some point on the line of the road, the property purchased and occupied by the company as a principal office for the transaction of its business, though not on the immediate line of its road but convenient thereto, is liable to be seized and sold on plaintiff's execution? Perhaps it would not be difficult to show that there is the same

reason for holding the principal office of a railroad company exempt from levy and sale on execution as there is for the exemption of the rolling stock and other equipments of its road. But it is not necessary to discuss this question.

Rule absolute.

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*In the Common Pleas of Luzerne County.*

DOTRO v. DOTRO AND WIFE.

(Vol. VIII., p. 411. 1861.)

A judgment entered on the note of a married woman for the purchase-money of real estate, will not be stricken off, unless she rescinds the contract and re-conveys the land to the grantor.

RULE to show cause why judgment shall not be stricken off as to Ellen Dotro.

CONYNGHAM, P. J.—It is agreed that Ellen Dotro is, and was at the time of giving the note upon which this judgment is entered, a married woman, the wife of Charles Dotro. It is further agreed that the note was given to secure the price of a piece of land, conveyed in consideration of it by deed to the said Ellen, at the same time; which land she still holds and claims, and we have no intimation to us but that she still intends to do so. The present application shows, however, that while she intends to keep the land, she would prefer not to be bound to pay for it. If the present rule be made absolute, she would thus, by a technical objection, be enabled to practice what, it is not using harsh language to say, would be a gross fraud; or rather, she is asking the court to place her in a situation where she may commit this fraud. If we can do it, it will be better to save her from the temptation.

If she should desire to avoid her contract by rescinding, we would free her from all liability for the price, duly reconveying to the grantor. But administering the law here, as we profess to do, in equity, we cannot aid her to defraud the party out of land and money both. It is true, she cannot keep the land, if

she refuses to pay for it, on the ground of coverture, as decided in *Heacock v. Fly*, 2 Harris 540; but if she and her husband should sell to a *bona fide* purchaser, without notice, actual or legal, the right to the land might be transferred.

While we fully recognise the principle decided in *Glyde v. Keister et ux.*, 8 Casey 85, that a judgment note on land given by a married woman, to encumber property actually belonging to her, is invalid and void, as well since the Married Woman's Act of 1848 as before; yet we still think she may charge her real estate, conveyed to her, with an encumbrance for the purchase-money, agreed to be given to secure the payment, and executed or completed simultaneously with the deed for the land. The later decisions have given us no reason to doubt the propriety of the opinion of Chief Justice Lewis, in *Patterson v. Robinson*, 1 Casey 88.

In conformity with that decision, we refuse to make the rule herein absolute, but will modify the judgment as to *Ellen Dotro*, so as to confine its lien and collection only to the property, to secure the purchase-money of which it was given, and to discharge it otherwise as to any other property of the said *Ellen Dotro*.

We direct the plaintiff's attorney to file as of the records of the case, a description of the property above referred to, as the property liable for the payment of this debt.

See *Robinson v. Patterson*, 1 Pittsb. 63, and cases cited in note.

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*In the District Court of Allegheny County.*

HAYES v. KENNEDY ET AL.

(Vol. IX., p. 33. 1861.)

1. The owners of a steamboat are liable, as common carriers, for the loss of freight occasioned by collision with another boat, even though it occur without default on the part of the owners or those navigating the carrier boat.
2. But where the bill of lading contracts to deliver safely, "the unavoidable dangers of the river navigation excepted," and loss by collision occurs without

default of the carrier boat, the loss is within the exception, and the owners of the boat are not liable, even though the collision was occasioned by the negligence of those navigating the other boat.

3. The phrases "perils of the sea," "dangers of the river," and "dangers of the river navigation," discussed.

THE plaintiffs had shipped on the *Nat Holmes* from the port of Wheeling for St. Louis, two carriages, which the defendants, by the bill of lading, contracted to deliver safely and in good order, "the unavoidable dangers of the river navigation and fire excepted." While descending the Ohio (then at high water) near Aurora, Ind., the *Nat Holmes*, in the proper place, having given the usual signals, and using all possible means to avoid the collision, was run into by the *David Gibson* ascending the river, and both boats were immediately sunk, and the carriages in question were thereby lost. Suit was brought against the owners of the *Nat Holmes* to recover the value of the carriages, and on the trial of the case, the jury found for the plaintiffs in the sum of \$489, subject to the opinion of the court on the question of law reserved, as to the liability of the defendants under the exception in the bill of lading, there having been no default on the part of those navigating the *Nat Holmes*, but negligence on the part of those navigating the *David Gibson*.

*Hamilton and Acheson*, for plaintiffs.—As common carriers the defendants are liable, unless the loss is occasioned by the act of God or public enemies. They are insurers. The exception in the bill of lading only applies to such inevitable accidents as are not produced by human agency: *Angell on Carriers*, §§ 166, 168 and notes; *Blythe v. Marsh*, 1 *McCord* 360. The loss by collision is occasioned by human agency, and is not within the exception. The owners of the carrier boat are liable to their freighters, and have their action over against the delinquent boat: *Lawrence v. McGregor*, 1 *Wright (Ohio)* 193.

*Thomas Ewing*, for defendants.—As common carriers defendants are insurers and liable, but by contract a common carrier may limit his liability, for all losses not occasioned by his own default, but the burden of proof is on him: 6 *W. & S.* 495.

The plain import of the terms of the exception brings it within this case: "perils of the sea" and "dangers of the river" will include accidents arising from human agency not the default of the carrier: *Flanders on Shipping*, §§ 305, 306, 307; *Story on Bailments*, §§ 497, 512, 514; *Smith v. Scott*, 4 Taunt. 126; *McArthur v. Sears*, 21 Wend. 190; *Buller v. Fisher*, 3 Esp. 67; *Aymar v. Astor*, 6 Caines 267; *Abbott on Shipping* 240, 313.

The exception in this case is broader than "perils of the sea" or "dangers of the river."

The opinion of the court on the question of law reserved, was delivered, August 10th, 1861, by

WILLIAMS, A. J.—This is an action to recover damages for the non-delivery of a buggy and carriage, shipped for the plaintiffs on the steamboat *Nat Holmes*, belonging to the defendants. The *Nat Holmes*, when descending the Ohio river, below Cincinnati, on her way to St. Louis, without any default on the part of her officers and crew, was struck by the steamer *David Gibson*, coming up the river, and immediately sunk with all her cargo, and the plaintiff's buggy and carriage were lost. It is admitted that, under the circumstances, no ordinary care, skill or diligence could have prevented the collision with the *David Gibson*; but there was negligence on the part of the officers and crew navigating the latter boat, which led to the collision.

The question is as to the liability of the defendants for the loss of plaintiff's buggy and carriage. As common carriers, they are clearly liable for the loss, unless relieved by the exception in the bill of lading. Is the loss then within the exception of "the unavoidable dangers of the river navigation?" What is the import and meaning of this phrase? What are the unavoidable dangers intended by the exception? Are they only such inevitable perils or accidents as are attributable to natural causes; or do they embrace other unavoidable perils or accidents of an extraordinary nature attributable to human agency and causes other than those that are natural.

The exception of "perils of the sea" is common in bills of lading of carriers by sea. Justice Story, in his commentaries on

the Law of Bailments, § 512, says: "What is the precise import of this phrase is not, perhaps, very exactly settled. In a strict sense, the words, 'perils of the sea,' denote the natural accidents peculiar to that element; but in more than one instance these words have been held to extend to events not attributable to natural causes. Thus, they have been held to include captures by pirates on the high seas, and losses by collision of two ships, where no blame is imputable to either, or at all events where none is imputable to the injured ship." Among other authorities cited in the note in the margin, is the case of *Buller v. Fisher*, 3 Esp. 67, where Lord Kenyon ruled that a loss from a ship's running foul of another by misfortune is a loss by perils of the sea, and within the exception of "perils of the sea" in the ship's charter-party.

"The import of the phrase 'dangers of the river,' like that of 'perils of the sea,'" says Mr. Angell, in his *Treatise on the Law of Carriers*, § 168, "is not, perhaps, very exactly settled." And after referring to the fact that the exception has received the particular attention of the Supreme Court of Alabama, and that in *Jones v. Pitcher*, 8 Stew. & Port. 135, 176, the court considered that "the perils of the sea and of the river" are so nearly allied, that they may be considered the same, except in the few instances, in which the reason differs, he proceeds to say: "That there is a distinction between perils of the 'navigation' and 'the act of God,' in bills of lading, is considered to be settled, and that the bill of lading may, in transportation by water, introduce exceptions not existing by the common law, which seems to be asserted in *Aymar v. Astor*. In *Johnson v. Friar*, 4 Yerg. 48, it was held, that the expression 'dangers of the river excepted,' in bills of lading, meant only such as no human skill or foresight could have guarded against. In other words, it means all unavoidable accidents, for which common carriers by the general law are not excused, unless they arise from 'the act of God.' The distinction in *Gordon v. Buchanan*, 5 Yerg. 72, is expressly taken, for in that case it is said, that the act of God 'means disasters with which the agency of man has nothing to do, such as lightning, tempests and the like.' The 'perils of the river' includes something more: 'Many disasters which would



not come within the definition of the act of God, would fall within the exception in this receipt. Such, for instance, as losses occasioned by hidden obstructions in the river, newly placed there, and of a character, that human skill or foresight could not have discovered and avoided.' "

So too, in *McArthur v. Sears*, 21 Wend. 200, Cowen, J., in delivering the opinion of the court says: "But it seems clearly to me, from authorities I have been able to consult, that the expression perils or danger of the sea, or dangers of the river, &c., will be found to allow, in several cases, human agency and other causes to excuse a loss, which cannot be allowed in favor of common carriers, without giving up the rigorous obligation imposed upon them by the policy of the law." And in *Neal v. Saunders*, 2 Sm. & M. 578, the court say: "This exception ('dangers of the river') has the effect to exempt the carrier from losses arising, not only from natural causes, but from accidents which are usually considered as peculiar to the river." But in *Whitesides v. Thurlkill*, 12 Sm. & M. 590, the very point raised in this case is expressly decided. That was an action to recover damage for injury done to thirty bales of cotton, shipped by Thurlkill upon a flat-boat belonging to Whitesides. The bill of lading was in the usual form, agreeing to deliver the cotton in Mobile in good order, the dangers of the river excepted. The boat was descending the river below Dunopolis, in the night, when a steamboat, likewise going down, struck the flat-boat, knocked off some of the planks and sunk it. The cotton was recovered and sent to Mobile, but in a damaged condition. And it was there ruled that a common carrier may, by express stipulation in his contract, limit the extent of his liability at common law; and by the exception of the bill of lading, of "dangers of the river," this common law responsibility is so far modified, that the carrier boat making the exception will not be liable for an injury to the article carried, caused by collision with another boat, without fault on the part of the carrier boat or its hands; and hence, it was held erroneous to instruct the jury, that the defendant was liable, unless the loss was occasioned by inevitable accident, by which was meant such an accident or casualty as no human foresight could have guarded against; but the jury

should have been told that the defendant was not liable, if the loss arose without fault on his part, or that of the hands upon his boat; but if they had been guilty of negligence, or might have prevented the loss by the exercise of reasonable skill and diligence, then he would be liable. On the other hand in *Blythe v. Marsh*, 1 McCord 360, as condensely reported in the note to § 166 in Angell on Carriers, where the Planter's Friend, in attempting to pass, came in contact with the None-Such and sunk her, in an action brought by the owner of a quantity of rice shipped on board the None-Such, which was lost, upon a bill of lading, in the usual form, "excepting the dangers of the sea," it was held, that the collision was the result of negligence, in the management of one or both the vessels, and that the owners of the None-Such were in either case liable to the shipper—that a collision which would excuse the carrier must be such as could not be avoided by human prudence and skill.

I have not been able to lay my hand on the volume containing the report of this case, and must, therefore, take it at second hand. But as condensed by Mr. Angell it would seem to be in conflict with *Buller v. Fisher*; *Whitesides v. Thurlkill*, and the other authorities to which reference has been made. The weight of authority, as it seems to me, is decidedly in favor of the doctrine laid down in *Whitesides v. Thurlkill*, that a loss from collision is within the exception, if it occurs without the fault of the owner, or the hands upon the carrier boat, and cannot be prevented by the exercise of reasonable skill and diligence on their part.

The parties must have intended something by the exception in the bill of lading. Did they intend less than is implied by the plain and obvious meaning of the words, "unavoidable dangers of the river navigation?" Is not the danger of collision one of the unavoidable dangers of the river navigation, as much so, as the danger of running upon a concealed snag or hidden stone in the channel of the river, brought down and deposited there by a recent flood? That a loss in such case would be within the exception of "the dangers of the river" is clearly implied in *Whitesides v. Russell*, 8 W. & S. 44. But it seems to me that "dangers of the river navigation" is a phrase of larger import than "dangers of the river," and that it clearly embraces dangers by

collision, where there has been no fault, or want of ordinary care and skill on the part of those navigating the injured boat. The judgment must, therefore, be in favor of the defendants on the reserved question.

And now, to wit, August 10, 1861, this case came on to be heard at the last term of the court on the question of law reserved on the trial, and was argued by counsel, and upon consideration thereof, it is now ordered that judgment be entered in favor of the defendants on the said reserved question *non obstante veredicto*.

Affirmed, 5 Wright 378.

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*In the Common Pleas of Clinton County.*

THATCHER & WOODROFF v. DICKINSON & SNYDER.

(Vol. IX., p. 41. 1861.)

Where a defendant is seised of real estate in the county in which an original judgment is obtained against him, sufficient to entitle him to a stay of execution under the Act of 21st May, 1861, he will be entitled, by reason of such seisin, to a stay in any other county in the state to which the judgment may be transferred.

THE following opinion was delivered, July, 1861, by

LINN, P. J.—The question for decision here is whether, in case the defendants are seised of real estate in Clearfield county, where the original judgment was obtained, sufficient to entitle them to a stay of execution under the Act of 21st May, 1861, they will be entitled, by reason of such seisin, to a stay in this (Clinton) county, whither the same has been transferred in pursuance of the provisions of the Act of 16th April, 1840. The plaintiffs' counsel contend that the judgment so transferred has the same force and effect, so far as concerns execution process, in this county as if it had been originally entered there, and hence he deduces an argument that the defendants can obtain a stay only by entering bail, they having no real estate in Clinton county. We do not so read the law. The Act of Assembly

under which the stay is claimed provides that such stay shall be granted, if, in the opinion of the court having jurisdiction of such judgment, or a judge thereof in vacation, the defendant is possessed of real estate within the county where the judgment was obtained, or within any other county to which the said judgment shall have been transferred, subject to be sold for the payment of such judgment, worth, at a fair valuation, a sum sufficient to pay and satisfy the same, over and above other encumbrances and the amount exempted from levy and sale on execution. The plaintiffs construe this language to mean that a defendant must have real estate in the county where the stay is applied for, and that it is not sufficient that he prove a seisin of land in another county, bound by the lien of the judgment, which is sufficient in value to satisfy the requirements of the act. Such a construction would, we think, be unreasonable and inconsistent with the liberal spirit of the statute. The Act of 21st March, 1806, gave a stay of execution, "if the defendant in the opinion of the court was possessed of real estate worth the amount of such judgment, clear of all encumbrances." Under this act it was held that a defendant could claim stay of execution as a freeholder only where he had real estate in the county where the judgment was obtained, limiting the general words so as to answer the intent of the law: *Commonwealth v. Meredith*, 5 Binn. 482. This act was supplied by the codified Act of 1836, which expressed in plain and unambiguous language, what the court had held to be the design of the Stay Law of 1806; that the defendant must be "possessed of an estate in fee simple, within the respective county." This latter act constitutes the basis of the Stay Laws, which have been since passed to afford temporary relief in times of unusual commercial embarrassment, most of the statutes on the subject being similar in their general provisions and differing only in details. But the Act of 16th April, 1840, gave rise to new questions touching the right to a stay of execution; and in a case wherein a defendant claimed a stay under the Act of 18th October, 1857, it was held that, when a judgment has been transferred from one county to another, and execution process issued thereon, a stay of execution granted in the county where originally entered, does not affect the process: *Baker v.*

King, 2 Grant 254. This case was decided by the Supreme Court in 1859. The doctrine therein asserted puts a defendant to the necessity of following a judgment obtained against him, into every county where the plaintiff might please to transfer the record, and there enter bail, if he be not possessed of real estate in such latter county, otherwise execution may be issued. Hence were a plaintiff disposed to vex or annoy his debtor, he could compel him in order to obtain an effectual stay to give security in ten, twenty or even more counties in the state for the same debt. The general intent and meaning of all our statutes providing for a stay of execution, is that a stay shall be granted to a defendant for a specified period, if the plaintiff's debt is fully secured. This seems just and reasonable, and promotive of public convenience. The inconvenience likely to result to a defendant, by a transfer of judgment under the Act of 1840, according to the ruling in *Baker v. King*, *supra*, is such as would seem to invoke legislative interference, and we cannot but think that the peculiar phraseology of the Act of 1861, wherein it differs from the previous Acts of 1836 and 1857, was intended to meet the case. The act says that there shall be a stay "where the defendant is possessed of real estate within the respective county or counties in which such judgment shall have been obtained, or in any other county within the Commonwealth, to which the said judgment shall have been transferred." This latter alternative is peculiar to the Act of 1861, and is not found in the Act of 1857. Now this variation of expression was intended to serve a purpose; and, viewing the whole scope and design of the act in the light of previous statutes and decisions thereon, and of the times and circumstances which brought it forth, we understand the legislature to provide, that, if a defendant has the requisite amount of real estate, bound by the lien of a judgment in any county, to entitle him to a stay in such county where the real estate is situated, he is entitled by virtue thereof to a stay upon the same judgment, in any other county in the state where the same may be entered of record. Any other construction would seem to us to be at variance with, not only the evident meaning and intention, but also with the plain language and directions of the statute.

It appears that Mr. Dickinson, one of the defendants, is seised of real estate in Clearfield county, where the judgment was originally obtained, sufficient in value, in our opinion, to entitle him to a stay of execution, under the Act of 21st of May, 1861; as we construe its meaning and intention, a stay of execution is, therefore, awarded to the defendants in the judgment within stated as entered of record in Clinton county, for one year from the date thereof, viz.: from the time at which the same was originally obtained; and the sheriff of Lycoming county is directed to return the writ of *test. fieri facias* issued thereon accordingly.

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*In the Supreme Court of Pennsylvania.*

MURPHY'S ASSIGNMENT.

(Vol. IX., p. 50. 1861.)

An assignment to a trustee for the benefit of a part of the assignee's creditors must be recorded.

ERROR to Common Pleas of Northampton county.

The opinion of the court was delivered by

WOODWARD, J.—The assignment of 15th December, 1858, by John W. Murphy to James M. Porter, Jr., was upon the express “trust that the said James M. Porter, Jr., shall retain all moneys I owe him; and out of the residue, shall pay William R. Hensen, the debt I owe to him, and out of the residue, if any, pay to A. & P. Roberts, a debt that I owe to them.” The instrument is formal and was duly sealed and witnessed. It establishes a trust in Porter for the benefit of himself and the other creditors named. That it was a partial assignment in respect either of the debtor's estate or of his whole list of creditors, makes it none the less an assignment in trust for the benefit of the creditors who are specified in it. That such an instrument, unrecorded, is void, against a subsequent attaching creditor, is shown by the Acts of Assembly and the adjudged cases referred to in the argument.

to the proximate cause, and, if occasioned by a peril insured against, is within the policy, although the remote cause may be the negligence of the assured, his servants or agents. The simple fact of negligence in either, however great in degree, is no defence to the underwriter.

3. Where there is no evidence that turpentine, by means of which the boat was set on fire, was carried without the license required by the Act of Congress, the legal presumption is that the requirements of the law in this respect was complied with.

THIS was an action of covenant on a policy of insurance.

The history of the case is fully given in the opinion, *infra*.

*Barton, Shinn and Penney*, for plaintiffs.

*Woods and Williams*, for defendants.

The opinion of the court was delivered August 31, 1861, by WILLIAMS, A. J.—This is an action of covenant, brought by Waldo Marsh, for the use of James Rees and others, against the Citizens' Insurance Company, upon a policy of insurance, bearing date the 13th of April, 1858, issued by the said company, causing the said Waldo Marsh (loss if any payable to James Rees), to be insured in the sum of \$5000, upon the one-fourth of the side-wheel steamboat *Ocean Spray*, whereof the said Waldo Marsh was then master: Beginning the adventure upon the said steamboat, lost or not lost, at noon, April 2, 1858, and to continue and endure until the 2d of May, or until notified by James Rees; in consideration of a premium at the rate of 12 per cent. per annum. The insurance, specified in the policy, is a general insurance to navigate the Ohio river and its tributaries; the Mississippi river at and between Keokuk, Iowa, and New Orleans, La., and the Illinois river, as said streams are usually navigated by boats of her class; and the adventures and perils insured against are of the seas, lakes, rivers, fires, enemies, pirates, assailing thieves and all such losses and misfortunes which shall come to the hurt, detriment or damage of the said steamboat *Ocean Spray*, according to the true intent and meaning of the policy; and it is agreed that the company shall not be liable for any loss or damage arising from or occasioned by the said steamboat being unduly laden, nor for any loss or damage arising from or occasioned by the bursting of boilers, the col-

lapsing of flues, or the derangement or the breaking of the engine or machinery, or any consequences resulting therefrom, unless the same be caused by unavoidable external violence. The policy also contains various other stipulations and conditions, such as are usual in marine policies, which it is not necessary to specify or notice. The agreed value of the boat was \$30,000, and the agreed amount of other insurance thereon, \$15,000.

Prior to the issuing of the policy, the said Waldo Marsh, by indenture bearing date, duly executed, acknowledged and recorded, the 23d of April, 1857, in the office of the Surveyor and Inspector of the Revenue, &c., in and for the port of Pittsburgh, had mortgaged the said steamboat Ocean Spray to James Rees, in trust, to secure to the said James Rees, W. Richardson, Thornburg & Boyd, and their respective endorsees, the payment of certain promissory notes drawn by the said Waldo Marsh, bearing even date with the said indenture, and payable as follows, viz.:

Three to the order of James Rees for \$1740 each, payable respectively at four, six and nine months; being the balance due him for building and furnishing the engines and boilers of the said steamboat Ocean Spray.

Two to the order of W. Richardson for \$1150 each, at four and eight months; being the balance due him for building and furnishing the cabin and joiner work of said steamboat.

Two to the order of Thornburg & Boyd for \$350 each, payable at six and eight months; being the balance due the said firm for the painting and glazing of the said steamer Ocean Spray.

One, if not two, of the notes payable to the order of James Rees, was subsequently endorsed and delivered to William Barnhill & Co.. The notes to the order of W. Richardson were endorsed to W. F. Ewing & Co., and the notes to Thornburg & Boyd were endorsed to R. E. Sellers & Co., and are now held by said endorsees respectively.

After the endorsement and delivery of the notes as aforesaid, James Rees, on the 31st of October, 1857, with the consent of the endorsees, assigned the mortgage to Jared M. Brush, of the firm of William Barnhill & Co., for the special purpose of enabling him, as their attorney in fact, to collect the amount of their re-



spective claims, and to satisfy the said mortgage. Mr. Brush proceeded to St. Louis, where the boat then was, and there received from Captain Marsh the sum of \$1000, which is all that has been paid on account of said claims. The notes and mortgage were afterwards sent to Messrs. Thomas & Sharp, attorneys at law of St. Louis, for collection and foreclosure, who instituted the necessary proceedings for this purpose; and upon Captain Marsh's voluntary appearance and confession, judgment was obtained for the amount due with a decree for the sale of the boat.

Captain Marsh then proposed to the said attorneys, in order to obtain time for the payment of the judgment, and to prevent, if possible, a sale of the boat, to assign to Mr. Rees, for the benefit of the parties in interest, two policies of insurance on the boat—one issued by the Quaker City Insurance Company for \$5000, which would expire on the 1st of April, 1858, and the other issued by the Delaware Mututual Insurance Company for \$3000, which would expire on the 16th of April, 1858—and in furtherance of the proposition, and because he could not assign the policies without the consent of the said insurance companies, he delivered them to the said attorneys, authorizing them to send the same to Mr. Rees for renewal at his expense, promising to pay the premium therefor, with the suggestion that if Mr. Rees did not consider these offices entirely safe, he was at liberty to insure the same amount in any good offices as security for the said judgment.

Accordingly, Messrs. Thomas & Sharp, on the 18th of March, 1858, wrote to Mr. Rees informing him that judgment had been obtained for the amount due with a decree for the sale of the boat, of Marsh's proposition and request for indulgence, enclosing the policies and suggesting the propriety of having them renewed, or new ones issued, making the loss, if any, payable to himself, and advising the extension of the indulgence requested by Marsh if consistent with a due regard to his own and the others' interests. Mr. Rees exhibited this letter to the secretary of the Citizens' Insurance Company when he made application for the policy in this case, who endorsed an acceptance thereon, in terms and conditions similar to those contained in the policy

subsequently issued and delivered to Rees, and upon which this action is brought.

The steamboat *Ocean Spray* was destroyed by fire on the 22d of April, 1858, on the Mississippi river, three or four miles above St. Louis, while on her way to Peoria. She left the port of St. Louis between four and five o'clock in the afternoon, in charge of Waldo Marsh, captain and owner, and at the time of the casualty, was racing with the *Hannibal City*, which had started from St. Louis about the same time, bound for Keokuk. When the *Ocean Spray* left, she had but "a small head" of steam, as the captain was intending to land about a mile and a half above, and take on board a quantity of salt; but when the boats commenced racing, this intention, at the solicitation of the passengers, was abandoned; and in order to get up steam a small quantity of rosin was at first used for the purpose of igniting and increasing the combustion of the wood and coal; and then, upon the suggestion of a passenger who had a barrel of turpentine on board, the captain after consulting the engineer, and being advised that the turpentine would not be dangerous if properly used, gave orders for its use. The barrel of turpentine was taken out of the hold by the mate and some of the hands, and placed in front of the furnace, about fifteen or eighteen feet from the furnace doors. The mate then knocked out the head of the barrel, and dipped out two-thirds of a bucket of the turpentine, and sprinkled or poured it over the coal in the box near the furnace. Some of the hands, and some of the passengers also, dipped a number of sticks of wood into the barrel of turpentine immersing and saturating them with the fluid, and threw them upon, or at the side of the box of coal near the furnace. Some of the wood and coal thus covered with the turpentine, was thrown into the furnace; and shortly after in again opening the furnace doors to stir up the fire, some burning coals fell down upon the saturated wood setting it on fire. Efforts were made to throw the burning wood overboard, but it was found impossible to do this, as the wood had become almost instantaneously enveloped in the flames. Orders were then given to remove, or throw overboard the barrel of turpentine, but in the attempt, the barrel was upset and its contents poured out. The turpentine,

as it ran down the deck to the burning wood, took fire, and as the fluid ran the flame followed, and a few moments all that part of the boat was ablaze. The pilot ran the boat to the Missouri shore, but the flames spread with such rapidity that the passengers had barely time to escape. Four or five were drowned, and in a short time the boat was burned to the water's edge, and the burning hulk floated down the current.

The company refused to pay the insurance on the ground that the loss was occasioned by the misconduct of the captain and crew acting under his orders, and thereupon this action was brought to recover for the use of the mortgage creditors the sum insured.

The declaration contains two counts: The first count sets out the policy at length, and alleges its execution and delivery by the defendant to the plaintiff, on the 13th of April, 1858; and avers that, on the 22d of April, 1858, on the Mississippi river between Keokuk, Iowa, and New Orleans, La., to wit: about five miles above St. Louis, Missouri, the said steamboat Ocean Spray caught fire and was burned, and became and was a total loss.

The second count sets out an application by James Rees, creditor, &c., to the proper officers and agents of the said insurance company to insure him against loss by accident or danger to the said steamboat Ocean Spray, whereby his security for the said debt, owed by the said Waldo Marsh, owner, &c., and secured by a mortgage on the said steamboat, should be lost; and alleges the execution and delivery by the said company to him of the policy mentioned in the first count, on the day and year aforesaid, whereby the said company covenanted and agreed to pay him the said sum mentioned therein, in case the said steamboat should be lost, and avers that, on the 22d of April, 1858, at or near St. Louis, Missouri, the said steamer Ocean Spray caught fire and was consumed, and became a total loss.

The defendant pleaded covenants performed *absque hoc*, &c., and upon the trial of the issue the foregoing facts were developed by the evidence.

A number of points were submitted by the counsel on both sides, upon which they prayed the instruction of the court to the jury.

But the court declined to charge the jury on the questions of law presented by the counsel, reserving the same for the con-

sideration of the court in banc, and, as it was agreed by the said counsel that there was no dispute in regard to the total loss of the said boat by fire, on the 22d of April, 1858, nor as to the value thereof, or the interest of the insured therein—proof of loss and proof of interest, &c., to the assurers, as required by the policy, all of which were admitted, the court submitted three questions of fact to the jury for their determination, viz. :—

I. Was the loss of the steamboat *Ocean Spray* occasioned by the fault or negligence of the legal plaintiff, Waldo Marsh, captain and owner of said boat?

II. If so, did such fault amount to gross negligence, recklessness, or wilful misconduct?

III. Was the said steamboat lost without any fraudulent intent on the part of the said Waldo Marsh to destroy the said boat?

And directed the jury to assess the damages arising from the said loss, subject to the opinion of the court in banc, upon the question reserved, viz. :—whether the plaintiff, under the pleadings and the admitted facts in the case, the application and the acceptance thereof, and the policy and mortgage given in evidence, is entitled to recover the said damages on the finding of the jury upon the questions of fact submitted to their determination?

And in answer to the said questions submitted for their determination, the jury found :

I. That the loss of the steamboat *Ocean Spray*, mentioned in the policy sued on, was occasioned by the fault or negligence of the legal plaintiff, Waldo Marsh, captain and owner thereof.

II. That the fault of the said captain, in this behalf, did amount to gross negligence, but not to recklessness, or wilful misconduct.

III. That the said steamboat was lost without any fraudulent intent on the part of the said Waldo Marsh to destroy the said boat.

And the jury assessed the damages at \$5659 50, which they found for the plaintiff, subject to the opinion of the court upon the question of law reserved.

Is the plaintiff, then, upon the reserved question, entitled to a

judgment for the amount found by the jury? His counsel contend that he is, on two grounds:

I. The policy was intended to be, and is, an insurance of the mortgage interest of James Rees, in his own right and as a trustee, in the steamboat Ocean Spray.

II. The loss of the said steamboat by fire was one of the perils insured against.

And therefore, on both grounds, the defendant is liable for the loss although occasioned by the gross negligence of the captain and owner.

The defendants' counsel, on the other hand, contend that the company is not liable for the loss, and that the plaintiff is not entitled to recover therefor:

I. Because the insurance contracted for in the policy, is an insurance of the interest of Waldo Marsh, as owner of the one-fourth of the steamboat Ocean Spray, and not an insurance of the mortgage interest or lien of the mortgage creditors.

II. The loss of the said boat by fire was occasioned by the gross negligence of the captain and owner.

What then was the contract as evinced by the policy in this case? Who were the parties thereto, and what was its subject-matter? Was the contract with the owner or with the mortgagee, to whom the loss was made payable? Was it the interest of the owner, or the interest of the mortgage creditor, that was insured? Undoubtedly the purpose and object of the insurance, as between the owner and mortgagee, was the protection and security of the interest of the latter, and the underwriter was informed of this when the proposal for the policy was made and accepted. But the motive inducing a contract, or the collateral purpose to be subserved thereby, does not necessarily determine its nature and character. It may help to determine its meaning where the language is doubtful or obscure. But where the parties to the contract are expressly named, its subject-matter, stipulations and conditions clearly defined, neither the motive inducing the contract, nor the collateral use to be made thereof, can be allowed to control or vary its interpretation. The contract in this policy was clearly with the owner. It was his interest that was insured. It matters not that the insurance was effected, in his absence, at

the instance of Rees, to whom the loss was made payable. Rees was but the agent of the owner in making the contract, and his appointee to receive the money, in case of a loss. And, therefore, if the owner cannot recover for the loss in question, there can be no recovery in his name for the use of his appointee: *State Mutual Fire Insurance Company v. Roberts*, 7 Casey 438. Doubtless the latter, by reason of his participation in the contract, and because, by its express terms, the loss is made payable to him, might maintain an action therefor in his own name: *Esling v. Zantzinger*, 1 Harris 50; *Myers v. The Keystone Mutual Life Insurance Company*, 3 Casey 268; but the undertaking to pay the appointee was an undertaking collateral to, and dependent upon the principal undertaking to insure the owner, and the right of the former, being wholly derivative, cannot exceed the right of the latter under whom he claims: per Harris, J., in *Grosvenor v. The Atlantic Mutual Insurance Company*, 17 N. Y. 391. And this brings us to the consideration of the main question in this case: Is the company liable for the loss of the boat by fire, occasioned by the gross negligence of the insured? If the negligence were of so gross a character as to border closely on fraud, or to amount to wilful misconduct, the underwriter would not be liable for the loss: *Chandler v. Worcester Mutual Fire Insurance Company*, 3 Cush. 328. But the jury in this case have found that the negligence of the insured did not amount to recklessness, or wilful misconduct; and that there was not a fraudulent intent on his part to destroy the boat. By recklessness, the jury must have understood something more than gross negligence—as importing a rash and culpable disregard of the obvious consequences of one's acts, and as synonymous with wilful misconduct. So that by the finding of the jury we have the case of a loss occasioned, not by the wilful misconduct or fraud of the insured, but by his gross negligence. The only question, therefore, is, whether the underwriter is liable for a loss occasioned by the gross negligence of the insured.

Whatever may be the conflict between the earlier and later cases, it seems to be now settled, that the mere negligence of the assured, however great in degree, will not operate as a discharge of the liability of the underwriter. In the absence of fraud or

wilful misconduct, the loss is to be attributed to the proximate cause, and, if occasioned by a peril insured against, is within the policy, although the remote cause may be the negligence of the insured, his servants or agents: *Patapsco Insurance Company v. Coulter*, 3 Peters 222; *Columbia Insurance Company v. Lawrence*, Id. 517; *Waters v. Merchants' Louisville Insurance Company*, 11 Id. 213; *Mathews v. Howard Insurance Company*, 18 Barb. 234; *Hynds v. Schenectady County Mutual Insurance Company*, 16 Id. 119; *Gates v. Madison County Mutual Insurance Company*, 1 Selden 469; *Mathews v. Howard Insurance Company*, 1 Kernan 9; *Delano v. Bedford Insurance Company*, 10 Mass. 355; *Copeland v. New England Marine Insurance Company*, 2 Metc. 432; *Catlin v. Springfield Fire Insurance Company*, 1 Sumn. 434; *Williams v. Suffolk Insurance Company*, 3 Id. 276; *Perrin v. Protection Insurance Company*, 11 Ohio 147; *St. Johns v. American Insurance Company*, 1 Duer 371; *Walker v. Maitland*, 5 B. & Ad. 171; *Shaw v. Robberds*, 6 Ad. & E. 75; *Sadler v. Dixon*, 8 Mees. & Wels. 895; *American Insurance Company v. Insley*, 7 Barr 223.

Let us look at some of the authorities. In the case of *The Patapsco Insurance Company v. Coulter*, Johnson, Justice, in delivering the opinion of the court, said:—"It seems generally conceded, that in the case of insurance against fire on land, negligence of servants or of the tenant is no defence, nor of the proprietor, unless of such a character as to sustain the imputation of fraud or design. And the rule that a loss, the proximate cause of which is a peril insured against, is a loss within the policy, although the remote cause may be the negligence of the master or mariner, has been affirmed in several cases in the English courts."

In the *Columbia Insurance Company of Alexandria v. Lawrence*, it was ruled that a loss by fire, occasioned by the mere fault or negligence of the assured, or his servants or agents, and without fraud or design, is a loss within the policy, upon the general ground that the fire is the proximate cause of the loss; and also upon the general ground that the express exceptions in policies against fire, leave this within the scope of the general terms of such policies.

The case of *Waters v. The Merchants' Louisville Insurance Company*, deserves special notice; resembling, as it does, the present in every essential feature. The action was on a marine policy, insuring the plaintiff on the steamboat *Lioness*, of which he was owner and master. The terms and conditions of the policy, and the perils insured against, were in substance, the same as in the policy in this case. The boat was lost while in charge of the owner, as captain, by being blown up, and destroyed by means of fire, communicated to gunpowder. In this case, as we have seen, the boat was destroyed while in charge of the owner, as captain, by means of fire communicated to turpentine.

The defendants filed six pleas to the declaration in that case, the first three of which sufficiently indicate the nature of the defence set up.

1.—That the officers and crew of the *Lioness*, at the time of her explosion and sinking, so negligently and carelessly conducted themselves in managing and attending to the safety of the cargo on board, that the steamboat was, by means of fire, negligently and carelessly communicated to gunpowder in the hold by the officers and crew, blown up and destroyed.

2.—That the *Lioness* was loaded in part with gunpowder, and that the officers and crew, or some of them, carelessly and negligently carried a lighted candle or lamp into the hold where the powder was stored, and negligently handled the candle or lamp at the time that the powder was exploded; and thereby produced the explosion and destruction of the said steamer.

3.—That the *Lioness* was in part loaded with gunpowder; and the same was so unskillfully, negligently, and carelessly stowed away in the boat, by the officers and crew, or some of them, that the gunpowder took fire by reason of the said unskillfulness, negligence, and carelessness; and the boat was consequently lost and destroyed by explosion.

The plaintiff demurred to the pleas, and the defendants joined in demurrer.

On the argument of the cause before the judges of the Circuit Court, for the district of Kentucky, four questions and points occurred, upon which the judges were divided in opinion; and



the same, at the request of the defendants, were stated and certified to the Supreme Court for its opinion; only two of which, viz: the 2d and 8d, need be noticed here:

2d.—Does the policy of insurance cover a loss of the boat by fire, caused by the negligence, carelessness, or unskilfulness of the master and crew of the boat, or any of them?

8d.—Is the allegation of the defendants in their pleas, or either of them, to the effect that the fire by which the boat was lost, was caused by the carelessness, or the neglect, or unskilful conduct of the master and crew of the boat, a defence to this action?

It will be perceived that these two questions virtually raise but one point, viz: Whether a loss by fire, remotely caused by the negligence, carelessness, or unskilfulness of the master and crew of the vessel, is a loss within the true intent and meaning of the policy.

In delivering the opinion of the court, Justice Story said: "If we look to the question upon mere principle, without reference to authority, it is difficult to escape from the conclusion, that a loss by a peril insured against, and occasioned by negligence, is a loss within a marine policy; unless there be some other language in it which repels that conclusion. Such a loss is within the words, and it is incumbent upon those who seek to make any exception from the words, to show that it is not within the intent of the policy. There is nothing unreasonable, unjust, or inconsistent with public policy, in allowing the insured to insure himself against all losses from any perils not occasioned by his own personal fraud. It was well observed by Mr. Justice Bailey, in delivering the opinion of the court in *Bush v. The Royal Exchange Assurance Company*, 2 B. & Ald. 79, after referring to the general risks in the policy, that 'the object of the assured, certainly, was to protect himself against all the risks incident to a marine adventure. The underwriter being therefore liable, *primâ facie*, by the express terms of the policy, it lies upon him to discharge himself. Does he do so by showing that the fire arose from the negligence of the master and mariners?' 'If indeed the negligence of the master would exonerate the underwriter from responsibility, in a case of a loss by fire, it would also in

cases of a loss by capture, or perils of the sea. And it would, therefore, constitute a good defence in an action upon a policy, to show, that the captain had misconducted himself in the navigation of the ship, or that he had not resisted an enemy to the utmost of his power.' There is great force in this reasoning, and, the practical inconvenience of carving out such an implied exception from the general peril in the policy, furnishes a strong ground against it; and it is to be remembered, that the exception is to be created by construction of the court, and is not found in the terms of the policy. The reasons of public policy, and the presumption of intention in the parties to make such an exception, ought to be very clear and unequivocal, to justify the court in such a course. So far from any such policy or presumption being clear and unequivocal, it may be affirmed that they lean the other way."

"This is not all: we must interpret this instrument according to the known principles of the common law. It is a well-established principle of that law, that in all cases of loss we are to attribute it to the proximate cause: *causa proxima non remota spectatur*: and this has become a maxim, not only to govern other cases, but (as will be presently shown) to govern cases arising under policies of insurance. If this maxim is to be applied, it disposes of the whole argument in the present case; and why it should not be so applied we are unable to see any reason." And the learned judge, after referring to a number of authorities, and alluding to the circumstances under which the case of the Columbia Insurance Company of Alexandria v. Lawrence came on for argument, concludes the discussion of the question in these words: "The court then thought, that in marine policies, whether containing the risk of barratry or not, a loss whose proximate cause was a peril insured against, is within the protection of the policy, notwithstanding it might have been occasioned remotely by the negligence of the master and mariners. We see no reason to change that opinion; and on the contrary, upon the present argument, we are confirmed in it." And accordingly, the Supreme Court ordered it to be certified to the Circuit Court as its opinion: "2d, that the policy does 'cover a loss of the boat by fire, caused by the negligence,

carelessness, or unskilfulness of the master and crew of the boat, or any of them.' '3d, that the allegations of the defendants in their pleas, or either of them, to the effect that the fire, by which the boat was lost, was caused by the carelessness, or the neglect, or unskilful conduct of the master and crew of the boat, is not a defence to this action.' "

The doctrine of this case has been followed by the Supreme Court of this state, in the *American Insurance Company v. Insley*, and by the courts of all the other states where the question has arisen.

In *Hynds v. Schenectady County Mutual Insurance Company*, Harris, Justice, in delivering the opinion of the court, said: "I think the judge who tried this cause has correctly stated the law on the question of negligence. The counsel for the defendant is entirely mistaken in supposing that the general principle which will not allow a party, himself guilty of negligence, to recover for the loss or injury to which he has thus contributed, is applicable to an action upon a policy of insurance. The general doctrine on that subject is, that mere negligence, whether of the insured or his agents or servants, constitutes no defence for the insurers: *Ellis on Insurance* 72. In *Waters v. The Merchants' Louisville Ins. Co.*, 11 Peters 213, it was said by Story, J., that the doctrine had for a great length of time prevailed, that losses occasioned by the mere fault or negligence of the assured or his servants, unaffected by fraud or design, are within the protection of policies. The charge in this case contains nothing more. The jury were told that mere negligence was not sufficient to defeat a recovery; that before this ground of defence could be made available, there must be evidence of such a degree of negligence as would evince a corrupt design. This I understand to be the well settled rule of law on this subject. If it were not so, policies of insurance against loss by fire would be of comparatively little value; for the cases are few in which losses by fire cannot be traced to some sort of carelessness or negligence on the part of the assured, or his family or servants. It is one of the objects of insurance to protect the party insured against negligence."

And in *Gates v. Madison County Insurance Company*, Jewett

Justice, said: "But another question arises upon the evidence offered, namely, whether a loss arising from the gross carelessness and negligence of the insured, his servants, or others, is within this policy. There can be no doubt that one of the objects of insurance against fire is to protect the insured from loss, as well against his own negligence as that of his servants, and others; and, therefore, the simple fact of negligence in either, however great in degree, has never been held to be a defence in such policy.

"The rule is well established, not only in the English, but in the general American Insurance Law; that in the absence of all fraud, the proximate cause of loss, only, is to be looked to; and the same rule now prevails in marine insurance."

Let these citations suffice to show upon what grounds and how firmly established in the law of insurance is the doctrine that where the immediate cause of the loss is a peril expressly insured against, it is no defence that the mere negligence of the assured or his servants, however great in degree, occasioned such peril, or brought the insured property within its dominion.

One or two other positions taken by the defendant's counsel remain to be noticed, viz: that the loss was occasioned in part by the misconduct of the insured in carrying oil of turpentine on board of the boat without special license therefor, or without the guards and precautions prescribed by the Act of Congress; and in navigating the boat in a manner different from that in which the Mississippi river is usually navigated by boats of her class. It is a sufficient answer that the jury have found no facts upon which to base such a defence. They have not found that the plaintiff was carrying oil of turpentine on board of his boat contrary to the provisions of the Act of Congress, or that he was navigating his boat in a manner different from that in which the Mississippi river is usually navigated by boats of the same class. True, these questions were not submitted to the jury for their determination: and why not? Because the court was then of the opinion, as now, that there was no sufficient evidence to justify the jury in finding either of said allegations to be true, or the court in submitting them as questions of fact to the jury for their determination. No notice was given to the plaintiff, by

plea or otherwise, that any such defence would be set up. No evidence was given to show, either that the turpentine was carried without a license, or that the boat was not provided with chests and safes as required by the act. There is no legal presumption that the plaintiff was, in this respect, violating the Act of Congress; and before the fact could be legitimately found by the jury the defendant was bound to give some evidence to show it: *Thornton v. Lance*, 4 Camp. 231; 2 Greenl. on Ev. § 402. The evidence in regard to the barrel of turpentine was given not for the purpose of showing that it was unlawfully carried on board of the boat, but that it was improperly and negligently used; and that the plaintiff was guilty of misconduct in this respect. All the evidence we have in regard to the barrel of turpentine is that it belonged to a passenger, and that, upon his suggestion, it was brought up out of the hold of the boat by the orders of the captain. There is nothing in the evidence tending to show that it was not secured there, as required by the Act of Congress, or that the plaintiff had no license for carrying this as well as the other articles specified in the act. The legal presumption, as we have seen, is that the plaintiff had done his duty in the premises, and observed all the requirements of the law.

So also in regard to the allegation that the boat was not navigating the Mississippi river as it is usually navigated by boats of her class. The only evidence tending to support this allegation is that which directly tends to show that the fire, by which the boat was destroyed, was occasioned by the negligence of the captain and crew. It is not pretended that there is any other evidence to support this allegation; and it is insisted that this is sufficient. If this be so, then the underwriters would not be liable, in any case, for a loss occasioned by the negligence of the master and crew. Because the very same evidence which tended to show that the loss of the boat was occasioned by the negligence of the master and crew, would also tend to show that the boat was not navigating the river, when the loss occurred, as it is usually navigated by boats of her class; and if sufficient to establish the one allegation, it would necessarily establish the other. And so, upon defendant's hypothesis, the underwriters

would not be liable for the loss of a boat in any case when occasioned by the negligence of the master and crew.

The whole purpose and tendency of the evidence given by the defendants, was to show that the loss of the boat was occasioned by the negligence and misconduct of the captain and owner, and the court submitted to the jury for their determination all the questions legitimately arising thereon.

Let judgment be entered in favor of the plaintiff, on the question of law reserved, for the amount found by the jury, with interest to be computed thereon from the date of the verdict, on payment of the verdict fee.

This case as here decided was reversed in the Supreme Court, 5 Wright 386, on the ground that the "gross negligence" found by the jury was in law "misconduct," which was not insured against. The opinion of Judge WILLIAMS is inserted here at the request of several members of the bar, who deem that its importance warrants its preservation.

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*In the District Court of Allegheny County.*

PRATT, FOR USE, v. TRUNICK.

(Vol. IX., p. 65. 1861.)

1. Where defendant contracted to give plaintiff a railroad truck and a horse in exchange for a patent right assigned by plaintiff, but failed from want of title to deliver the truck, the plaintiff cannot recover under a count for money had and received.
2. The plaintiff should file a special count, averring the exchange agreed on, the failure of title to the truck, its value, and notice to defendant.
3. In order that property given and received as money may be recovered as money, the agreement to treat it as such must be clear.

*Smith & Kuhn*, for plaintiff.

*R. & S. Woods*, for defendant.

Upon a question of law reserved, which is fully stated *infra*, the following opinion of the court was delivered, August 3d, 1861, by

HAMPTON, P. J.—It was conceded by the learned counsel on both sides, at the trial, that there were no disputed facts to be submitted to the jury; and the question of law reserved was, whether under the pleadings and evidence the plaintiff was entitled to recover.

The uncontradicted evidence discloses the following state of facts:—

Pratt, the legal plaintiff, was the owner of King's patent right for making shingles, and proposed to sell the same for the state of Kentucky to John G. McCormick, the defendant's son-in-law. The defendant had some time previously purchased from McCormick a "railroad truck." It was agreed between McCormick, Trunick and Pratt, that Trunick would transfer to Pratt the title to the truck, and McCormick was to give Pratt a horse, in payment of the patent right, which Pratt was to assign to McCormick.

Pratt executed and delivered an assignment of the patent to McCormick, who sent it to Washington for record. At the same time Trunick executed and delivered to Pratt the two following papers, viz.:—

PITTSBURGH, May 26th, 1858.

ALVAN H. PRATT, Esq.,

Dr.

To JAMES TRUNICK,

1 Eight Wheeled Railroad Truck, at Homer Station, on the P. Railroad, in care of Mr. Wilson at said station. Price \$500.

Received pay in full,

JAS. TRUNICK.

PITTSBURGH, May 26, 1858.

MR. WILSON—Sir: Please let Mr. Alvan H. Pratt have my R. R. Truck, as I have sold the same to him.

JAS. TRUNICK.

The horse was subsequently delivered by Trunick, who had him in possession. Sometime previous to this transaction, the sheriff of Indiana county had levied on this truck, which was found within his bailiwick, as the property of McCormick, at the suit of a judgment creditor, which levy was still in full force when Pratt presented Trunick's order, and its delivery was

refused by Wilson on that ground. The truck was subsequently sold by the sheriff, and was never delivered to Pratt; and now this suit is brought to recover its value, after notice of the foregoing facts to the defendant.

The defendant alleged, but failed to prove, fraud or misrepresentation on the part of the plaintiff as to the title or qualities of the machine. The contract, so far as its character is disclosed by the evidence, was fairly entered into, and a full performance is shown on the part of the plaintiff; so that, in point of fact, unless there be some legal difficulty in the way, he will be entitled to recover. The consideration, so far as the truck is concerned, utterly failed, by reason of its seizure by the sheriff, as before stated.

The defendant contends that the plaintiff cannot recover under his declaration, which is in the common counts; that he should have filed a special count, setting forth the transaction as it really was; and this is the only question of any importance in the case.

It would undoubtedly have saved both the counsel and the court some trouble, and rendered the plaintiff's right to recover much plainer, if a special count had been filed, averring the exchange of the patent right for the truck and horse, the failure of title to the truck, its value and notice to the defendant. The plaintiff's counsel, however, have seen fit to rest their case on the count for money had and received. If this be sufficient, judgment must be entered on the verdict; otherwise it must be for the defendant, *non obstante veredicto*. On the facts, as we have already shown, the justice and equity of the case are clearly with the plaintiff. The action of assumpsit has always been regarded as an equitable action, and whenever it is shown that the plaintiff in equity and good conscience ought to recover, this form of action may be employed, unless there be some technical rule of law in the way. And particularly the count for money had and received, which, in its spirit and objects, has been likened to a bill in equity, may in general be proved by any legal evidence, showing that the defendant has received or obtained possession of the money of the plaintiff, which, *ex aequo et bono*, he ought to pay over to the plaintiff. The subject of the action must



either originally have been money or that which the parties agreed to treat as money. It is a liberal action, in which the plaintiff waives all tort, trespass and damages, and claims only the money which the defendant has actually received. But if the defendant has any legal or equitable lien on the money, or any right of cross action upon the same transaction, the plaintiff can recover only the balance, after satisfying such cross demand.

The actual receipt of money by the defendant, is not indispensable, in order to the maintainance of this action. If by the agreement of the parties, certain things are to be treated as money, it will be sufficient. Accordingly it has been held that this count may be supported by evidence of the defendant's receipt of bank notes: 18 East 20; or promissory notes: 8 Mass. 405; 7 Johns. 182; 9 Pick. 93; or credit in account, in the books of a third person: 3 Campb. 199; or a mortgage assigned to the defendant as collateral security, and afterwards foreclosed and bought in by him: 8 Wend. 641; or a note payable in specific articles: 7 Wend. 311.

In *Spratt v. Hobhouse*, 4 Bing. 177, it was said by Best, C. J., that it had been established ever since the case of *Longchamp v. Kenny*, Doug. 137, that if a party gives another what may be readily turned into money, it may be treated as such, in an action for money had and received. And in the same opinion he says, "in a case tried before me at Lincoln Summer Assizes, 1825 (*Fox v. Cutworth*), county bank notes had been received to the use of the plaintiff, who sued for money had and received; and the Court of King's Bench held afterwards, on a motion for a new trial, that if they had been received as money, they might be sued for as such"; and in *Dickan v. Bankes*, 13 East 20, where a stakeholder, receiving country bank notes as money, and paying them over wrongfully to the original staker after he had lost the wager, was held answerable to the winner in an action for money had and received, Lord Ellenborough said, "Provincial notes are certainly not money, but if the defendant received them as money, and all parties agreed to treat them as such at the time, he shall not now turn round and say they were only paper and not money, as against him it is so much money received by him."

Doebler et al. v. Fisher, 14 S. & R. 179, is the only case I have been able to find in our own state which in any way resembles the present. The case is very imperfectly reported, but it would seem the plaintiff in the court below purchased from the defendants a patent right for bleaching linen and cotton, for which he gave them in exchange a horse, which was proved on the trial to be worth one hundred and fifty dollars. The probability is, although it is not stated, that the title to the patent failed, or in some other way the purchaser of the patent conceived himself entitled to recover back from the defendants the value of the horse. He brought an action of assumpsit, and filed a declaration in two counts, the first for money paid, laid out and expended, the second for money had and received. The Supreme Court held that the proof did not support the declaration. Huston, J., in delivering the opinion of the court says: "The horse was given absolutely in exchange for the patent right, to be kept as the party's own property—not delivered to be sold, or the price of him accounted for in any way; no price was put on the horse by the parties."

In *Beals v. Lee*, 10 Barr 56, it was held that money had and received will not lie for the value of goods sold which were to be paid for in merchandise.

In that case the late C. J. Gibson, says: "It is true, as was said in *Ainslie v. Wilson*, 7 Cowen 662, that property given and received as money, may be recovered as money, but the agreement to treat it as such must be clear."

The evidence in this case, taken altogether, shows very clearly that the transaction was a mere exchange of commodities—the patent right for the truck and horse. True, the bill and receipt given in evidence by the plaintiff, shows nothing but a money transaction, and standing alone, unexplained, would entitle the plaintiff to recover; but when coupled with the uncontradicted evidence of Woods and McCormick, the case is entirely changed. Instead of Pratt having paid \$500, or any other sum in cash to Trunick, it appears he gave to his son-in-law, McCormick, a patent right for the truck, on which no price or value whatever was fixed. McCormick says in his testimony, "Pratt and I made an agreement for the purchase and sale of King's patent right

for making shingles, for the state of Kentucky. I was to give him a horse and this railroad truck for it."

Thomas Woods says: "After the parties had concluded their bargain they came into my office, or rather made it there, and then stated to me what it was—that is, that Pratt was to have a horse and this truck for the patent, if McCormick concluded to take it within a given time." Those are the only witnesses who were present, or who undertake to testify as to what the bargain was between the plaintiff and McCormick. The latter testifies that shortly afterwards, when he was about to leave for the West, he instructed the defendant to close up the bargain, which he did.

Here there is a clear case of barter and exchange of commodities; and afterwards, when the transfer of the truck was about to be made, it was thrown into the form of a bill and receipt, but for what purpose does not appear. No price appears to have been fixed, at the time of the contract, either on the patent, the truck, or the horse. This brings the case directly within the principle laid down in *Doebler v. Fisher*, and all the others cited, viz: that where no money has been actually received by the defendant, the evidence of an intention by the parties to treat the article of property received as money should be very clear. Here directly the reverse is clearly established by all the evidence in the cause.

I am, therefore, clearly of opinion that the plaintiff cannot recover under his present declaration, and the defendant is entitled to judgment on the question of law reserved, *non obstante veredicto*.

Let judgment be entered for the defendant accordingly.

Grosholtz v. Stifel, 4 Phila. 16.

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*In the District Court of Allegheny County.*

MANTZ'S EXECUTOR v. STINSON'S EXECUTOR.

(Vol. IX., p. 66. 1861.)

Where a widow and her minor children render service to another, upon his promise to her to pay her for her own and the children's services, she is

entitled to recover for their services, as well as for her own. Her right to recover is based on the privity of contract and the express promise, for which there was a sufficient consideration.

*Marshall & Brown*, for plaintiff.

*R. & S. Woods*, for defendant.

The following special verdict was found by the jury :

"In this case the jury find for the plaintiff, for the service of Sarah Mantz, deceased, plaintiff's testatrix, the sum of \$542 92, and for the service of Rachel, minor daughter of the said Sarah Mantz, the sum of \$78 86, and for the service of John Mantz, minor son of the said Sarah Mantz, \$232 68.

"And the jury further find that at the time the said Sarah Mantz, deceased, entered into the service of the said Joseph Stinson, deceased, she was a widow, and that she and her said minor children, Rachel and John, entered into the service of the said Joseph Stinson, deceased, at his instance and request, upon the promise of the said Joseph to pay her, the said Sarah, for her and her said children's services, the said children being minors, between twelve and twenty-one years of age.

"But inasmuch as the jury are ignorant whether the plaintiff is entitled to recover for the services of the said minor children, in addition to the testatrix's own services, they pray the instruction of the court thereon ; and if the court shall be of the opinion that the plaintiff is entitled to recover as well the value of the services of the said minor children, Rachel and John, as for the services of the said testatrix, then we find for the plaintiff the sum of \$854 46, and if the court should be of the opinion that the plaintiff is only entitled to recover for the services of the said testatrix, and not for the services of the children of the said testatrix, then we find for the plaintiff the sum of \$542 92.

On the question of law thus raised, the following opinion was delivered August 3, 1861, by

WILLIAMS, A. J.—A widowed mother, at the request of the defendant, entered into his services, with her two minor children, upon his promise to pay her for her own and her children's services ; and the question raised by the special verdict is as to the

right of the mother to recover for the services of her children as well as for her own.

In *Edmundson v. Penny*, 1 Barr 384, which was an action on a parol promise "to bestow to Penny for McCandless's services as preacher, twenty-five dollars," it was said by Gibson, C. J., in delivering the opinion of the court, that "whatever may be the conflict of opinion in the earlier cases, it is now settled that a parol promise to one for the benefit of another, can support an action on it only by him from whom the consideration moved, or who was the meritorious cause of it."

But there is an exception to this rule, as shown in the opinion of this court, in *Campbell v. Lacock*, No. 108, April Term, 1859 (affirmed, 4 Wright, 448), in the case of an express promise, upon a sufficient consideration, to pay a third party where the latter participates in the contract; and in such a case the action may be maintained in the name of the third party by reason of the privity of contract. Vide, *Esling v. Zantzinger*, 1 Harris 50. Here the contract was with the mother, and the promise was to pay her for her own and her children's services. There was a sufficient consideration for the promise. Why then may not the mother, on the ground of the privity of contract, maintain an action for the services of herself and children? Grant that the mother is not entitled to the earnings of her children because not held to the duty of their maintenance—though, perhaps, under the provisions of the Act of the 18th of June, 1836, sections 29, 31, (Purd. Dig. 663, sections 34, 36), this may admit of doubt—still the action may be sustained on the privity of contract, and a recovery be had on the express promise of the defendant. The children are interposing no objection to the recovery. The statutory period allowed for bringing the action in their names has expired; and as the defendant has received the full consideration of his promise, I am not disposed to allow him, by a technical defence, to escape its performance and thereby defeat the ends of justice, if it can be possibly avoided.

The defendant relies on the case of *Leech v. Agnew*, 7 Barr 21. This case, as far as can be gathered from the very meagre and defective report of the facts, was an action of covenant on

indentures of apprenticeship, sealed by Leach, as guardian, I. Agnew, as apprentice, and by the defendant, whose name is not given, as master; whereby the defendant covenanted to teach Agnew the trade of a glass-blower, and to pay him ten dollars a month until a certain day; and for the residue of the time the half of a journeyman's wages. By an underwritten agreement or declaration of trust, sealed by the parties, it was agreed that the wages of the apprentice should be paid to his mother, during his apprenticeship. After the apprentice came of age, the master settled with him for all that could be claimed by the apprentice under the indenture. The action was brought in the name of the apprentice and his guardian, for the use of the mother, to recover the amount which had not been paid to her or her son with her consent. And the only question was, whether the agreement or declaration of trust appended to the indenture, which imported that the wages were to be paid to the mother, vested a right in her which could be enforced by action. And because the apprentice agreed to give away his earnings to his mother for no appreciable consideration, the court held that the beneficial ownership thereof was not vested in her, on the ground that an infant's contract, when prejudicial, is absolutely void.

That case differs from the present in the following particulars:

1. The apprentice was the legal plaintiff, and after he came of age, the master had settled with him and paid him his wages in full.
2. The mother was not a party to the indenture, or supplemental agreement appended thereto, and, consequently, there was no privity of contract between her and the master.
3. There was no consideration for the apprentice's agreement that his wages should be paid to his mother, and, for this reason, his contract was absolutely void.

There was, therefore, no ground on which the action for the mother's use could possibly be maintained, and the case is so unlike the present as to furnish no binding rule for its decision. *Edmundson v. Penny* is more directly in point; but may be distinguished from the present in this: there the promise was made not for the benefit of the promisee but for the benefit of the

preacher, the money promised was intended for the use of the latter and not for the use and benefit of the former. The promisee, therefore, had no interest in the promise. Here the promise was made for the benefit of the mother, and not for the benefit of the children. The value of their services was intended to be paid to the mother, not for their use but for the use and benefit of the mother, and she, therefore, has a beneficial interest in the promise.

But even if a doubt be suggested by the rule laid down in *Edmundson v. Penny*, as to the mother's right to maintain the action for the services of her children, it ought to yield to the justice of the case, which, as we have seen, can only be reached by sustaining the action in the name of the mother, and allowing judgment to be entered not only for her own but for the services of her children, as found by the jury.

And now, August 10th, 1861. This cause came on to be heard, at the last term of this court, on the special verdict found by the jury, and was argued by counsel, and it appearing to the court, upon consideration thereof, that the plaintiff is entitled to recover, as well for the services of the minor children of his testatrix, Sarah Mantz, as for the services of the said Sarah, it is now ordered that, on payment of the verdict fee, judgment be entered in favor of the plaintiff against the defendant for the aggregate amount found by the jury for the services of the said Sarah Mantz and her minor children, Rachel and John, viz: for the sum of \$854 46, with interest to be computed thereon from the date of the verdict.

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*In the District Court of Allegheny County.*

FORRESTER v. PRESTON.

(Vol. IX., p. 81. 1861.)

1. Where a husband, with the knowledge, concurrence and approbation of his wife, contracts in his own name for the erection of a dwelling on land

belonging to the wife, the lot and building is liable on a mechanic's lien filed for work done and materials furnished by a sub-contractor.

2. Frequent visits by the wife to the building during the progress of the work, giving directions concerning the work, and selecting materials for the building, constitute sufficient evidence of her knowledge and approbation of the contract for building.

THIS was a *sci. fa.* on a mechanic's lien.

On the trial the question of law was reserved, which is fully set out in the following stated case.

Josiah King and Samuel Gormly, executors of George Miltenberger, deceased, by deed bearing date the 3d of January, 1857, and recorded the same day in the office for recording deeds, &c., in and for the county of Allegheny, for the consideration therein mentioned, conveyed to Catharine Preston, wife of Barclay Preston, the defendant, the lot on which the dwelling-house described in the mechanic's lien in this case, is erected.

The lot was purchased and paid for by the husband of Mrs. Preston, and being intended as a gift to her, was, at the instance of her husband, conveyed to her by the said executors.

On the 2d of February, 1857, the said Barclay Preston and William H. Everson, who had purchased the adjoining lot of the executors of the said George Miltenberger for his wife, Mary Everson, entered into an agreement, in writing with V. G. Elliott, as contractor, for the erection on said lots of two three story brick dwelling-houses, with two story back buildings, of the dimensions therein set forth, and in accordance with the specifications accompanying the said agreement, for the consideration therein specified.

The contractor commenced the work on or about the 1st of March, 1857, and finished the buildings on or about the 5th of November following. The said buildings were erected together and adjoining each other, after the same plan and specifications, one of them being erected on the lot of Mrs. Preston, and the other on the lot of Mrs. Everson.

J. & H. Forrester, of which firm the plaintiff is the surviving member, furnished the materials for, and did the stone work of said buildings, at the instance of the contractor, V. G. Elliott. The contract price for the materials and stone work called for in



the specifications, was, by the agreement between the said Elliott and the said J. & H. Forrester, one thousand dollars for both houses. But as the grade was subsequently regulated and fixed, it became necessary to increase the depth of the walls at the lower end of the lots, and to add a belt course for pressed brick, which was done with the consent of Everson and Preston, so that the price of the materials furnished and work done by the plaintiff's firm for both houses amounted, in the aggregate, to the sum of \$1215 06; of which the sum of \$601 71 was apportioned to defendant's house, and the residue \$613 35 to Mrs. Everson's house. The stone work done by the plaintiff's firm, for which the claim in this case was filed, was commenced on or about the 17th of March, 1857, and finished the 2d of November, 1857, and the materials therefor were furnished as the work progressed. The claim for the said work and materials was filed, April 9, 1858; and before the expiration of six months after the completion of the furnishing of the said materials, and the finishing of the said work.

During the progress of the work, Mrs. Preston was frequently at the building—as often as once in every week or two—inspecting the work; sometimes in company with her husband, at other times with her son, giving orders and directions from time to time in regard to alterations which she desired to be made, changing the location of the cupboards, and directing them to be made with drawers, and the clothes-presses to be put on different sides of the room, and assisted her husband in the selection of the marble mantles ordered for the building.

These are the material facts on which the question of law in this case is reserved, viz.:—

Is defendant's building liable to a lien for the materials furnished and the work done by plaintiff's firm in the erection and construction thereof?

*Barton*, for plaintiff.

*R. & S. Woods*, for defendants.

The opinion of the court was delivered, August 10, 1861, by WILLIAMS, A. J.—If this were the case of the erection of a

building on the wife's separate estate without her authority, under a contract with a stranger, then, for the reasons given in *Bruner v. Sheik*, 9 W. & S. 119, the building would not be liable to a lien for the materials furnished and the work done by the plaintiff's firm for the contractor. But the building in this case was not erected without the consent of the wife, under a contract made with a stranger. It was erected under a contract made with the husband, and as the facts abundantly show, with the knowledge, approbation and concurrence of the wife. It is true that the husband made the contract in his own name, but the building contracted for was, with the knowledge and concurrence of the wife, designed and erected for her; and, therefore, in making the contract, the husband may be regarded in law as the agent of the wife; as much so as if he had avowedly acted by her express authority. The husband's agency may be legitimately inferred from the relation and acts of the parties. Why then should not the building be subject to a lien for the materials furnished and the work done by the plaintiff's firm? The plaintiff's claim falls clearly within the express provisions of the statute—and I am aware of no authoritative decision, or rule of construction, that makes it the duty of the court to declare that, though within the letter, it is not within the true intent, purpose and meaning of the act. The legal title to the building is in the wife, and the claim properly designates her as the owner or reputed owner; and though the contract for its erection was made in the name of the husband, it is subject to a lien for the materials furnished and the work done by the plaintiffs.

And in thus ruling, we do not infringe or set aside that provision of "the Married Woman's Act," which declares that the separate property of the wife shall not be in any manner encumbered by her husband, without her written consent first had and obtained and duly acknowledged—because, the lien does not arise from the act of the husband, but by operation of law. It is not created by the husband's contract, but has its origin and root in the statute by which it is imposed. Nor was the statute called into operation in this case as the direct and immediate consequence of the husband's contract, but by the fact that the plaintiff's firm, at the instance and request of the contractor,

furnished the materials and did the work. The lien, therefore, cannot, in any just sense, be regarded as an encumbrance by the husband.

But there is another aspect in which this case may be considered, in which the right of the plaintiffs to a lien for their work and materials appears equally clear. If the relation of husband and wife, existing between the parties, be set aside, we have this case: A building is erected, by a contractor, under a contract not made with the owner but with a third person in his own name. Materials are furnished and work done therefor by the plaintiffs at the request of the contractor. During the progress of the work the owner frequently visits the building; sometimes in company with the person by whom the contract was made, at other times in his absence, inspects the work and gives repeated orders in regard to the manner of its execution; directs certain alterations and changes to be made therein; orders extra work, not called for in the plan and specifications, and assists in the selection of some of the materials used in the building.

After doing all this, would it be in the mouth of the owner, when a mechanic's claim was filed against the building, to deny the agency of the person by whom the contract was made? Would he not, by his acts and declarations, be estopped from denying the agency, and from alleging that the contract was made without his concurrence and the sanction of his authority? Would not the agency be inferred and implied, as matter of law, from the acts and declarations of the parties?

Clearly, therefore, under the circumstances of this case, the owner, if the relation of husband and wife did not exist, would be estopped from setting up such a defence to the claim of the mechanic and material man. That the relation of husband is super-added to that of agent does not destroy or impair the validity of plaintiff's lien.

Let judgment be entered in favor of the plaintiff, on the reserved question, for the amount found by the jury, with interest from the date of the verdict, on payment of the verdict fee.

See *Ward v. Black et ux.*, 7 Phila. 342; *Lex v. Holmes*, 4 Id. 10; *Barto's Appeal*, 5 P. F. Smith 386; *Finley's Appeal*, 17 P. F. Smith 453.

*In the District Court of Allegheny County.*

## HUTCHINSON v. PRESTON.

(Vol. IX., p. 81. 1861.)

1. On a *sci. fa.* on a mechanic's lien, filed against a married woman as owner, it is proper, though not essential, to join the husband as defendant.
2. A mere technical omission to join the husband as a defendant is cured by a plea in bar, trial and verdict.

THE facts in this case are essentially the same as in the preceding case of *Forrester v. Preston*.

*Barton*, for plaintiff.

*R. & S. Woods*, for defendant.

The opinion of the court was delivered August 10, 1861, by WILLIAMS, A. J.—The only difference between this case and that of *Forrester v. Preston and Wife*, just decided, is that here the husband is not joined as a codefendant with the wife in the *scire facias* issued on the claim. In both the cases the claim designates the wife as the owner or reputed owner, but in the case of *Forrester v. Preston and Wife*, the husband is made a codefendant in the writ of *scire facias*. It seems to me that the husband might properly have been joined as a codefendant in this case. I see no objection to such a course, but I am not prepared to say that it is essential to the validity of the proceeding. The *scire facias* corresponds with the claim, and as the proceeding is *in rem* it may be maintained against the wife alone. At all events the objection is purely technical, and comes too late after plea in bar, trial and verdict. *Goodyear v. Rumbaugh and Wife*, 1 Harris 480; *Sheidle v. Weishlee*, 4 Id. 134; and for the reasons given in *Forrester v. Preston and Wife*, the plaintiff is entitled to judgment.

Let judgment be entered in favor of the plaintiff, on the reserved question, for the amount found by the jury with interest from the date of the verdict, on payment of the verdict fee.

See *Forrester v. Preston*, *supra*, p. 298, and cases cited; also *Van Billiards v. Nace*, 1 Grant 233.

*In the Circuit Court of the United States for the Western  
District of Pennsylvania. In Admiralty.*

SRODES ET AL. v. THE STEAMBOAT COLLIER, &C.

(Vol. IX., pp. 73, 193. 1861.)

1. A mortgage upon a vessel, recorded under the Act of July, 1850, in the distribution of the fund arising from the sale of the mortgaged vessel, must be postponed to the liens for supplies and repairs, under the Acts of Pennsylvania for the attachment of vessels, even though the indebtedness for the supplies or repairs may have accrued subsequent to the recording of the mortgage.
2. A mechanic having a lien upon a vessel, who receives a note for the same, cannot institute proceedings against such vessel until the maturity of the note, but may intervene, notwithstanding the note may not be due, and be paid out of a fund where the proceedings have been instituted by other parties.
3. Under the Pennsylvania Attachment Act of 1858, the acceptance of notes or other securities for an existing demand, which would entitle the party to a lien upon a vessel, is to be regarded as a collateral matter, which can in no way work a satisfaction or extinguishment of the lien within the two years given by the act, until the indebtedness represented by such notes, &c., be fully paid.
4. Hence the fact that the note-taker includes an indebtedness against another vessel, not embraced in the libel, will not prevent a recovery upon the original demand, so long as the note remains in the hands of the lien creditor. Neither would the fact that the mechanic had endorsed a new note, which the owner of the vessel had negotiated, and with the proceeds lifted the original note, given to the former for his demand, and that thus the original note had passed into the hands of the owner and maker.
5. A mechanic may proceed upon his original lien, even though he may have taken a note and receipted his original bill, if it be not shown that there was a contract to take the less security and release the better.
6. The assignee of a boat note may, without losing his lien under the act, renew his note held by him, and pass the original to the maker.
7. It is sufficient evidence that the articles were necessary, under this act, to show that the articles, &c., for which a lien is claimed, were ordered and furnished, and that from their nature they seem to be necessary.
8. To maintain a lien for insurance, the insurer must hold a note or other acknowledgment of indebtedness, given for the premium of such insurance, totally disconnected from all other transactions between the parties, whether insurance of other boats or articles, or otherwise.
9. The lien for supplies will not follow portions of a vessel which may have been used in the construction of a new vessel.
10. No attorney's fee can be paid to intervenors under this act, but one at-

torney fee being allowable in a case; and the fees of sheriff in such cases cannot exceed one dollar for each person served.

THIS was a libel in admiralty in the District Court, and the facts of the case are fully detailed in the following report by John H. Bailey, Esq., commissioner, to whom the matter was referred:

TO THE HON. WILSON McCANDLESS, JUDGE OF SAID COURT:—  
In pursuance of an order of your honorable court, made in the above cause, on the 26th day of last month, by which it was referred to me to ascertain and determine the amounts due the libellants and intervenors, and whether any have or are entitled to priority of payment, and to classify the different claims and appropriate the money in court, if sufficient to pay the whole of said claims, and if not to ascertain the *pro rata* amounts coming to the said parties, and make report of the same to said court, without delay, I proceeded to the discharge of the duties so enjoined, and beg leave to submit the following report:

The claims presented for allowance consist of

1. Seamen's wages, and herein of a claim of Thomas Adley.
2. Alleged maritime liens, being for wharfage at the port of Pittsburgh, and hospital dues arising under the Act of Congress of July 16, 1798.
3. Attachments by domestic creditors, under the state laws for the attachment of vessels, out of the District Court of Allegheny county, and Court of Common Pleas.
4. Mortgage against said vessel in favor of James Laughlin, trustee of the Pittsburgh Trust Company, and the Merchants' and Manufacturers' Bank of Pittsburgh, dated December 30, 1859, and recorded in the custom-house of the port of Pittsburgh, January 4th, 1860.

Considerable testimony was taken on the hearing before me, which is herewith filed, and made part of this report.

Respecting the libels for wages of John M. Srodes, Patrick Crawford and Thomas Hanna, there was no controversy, and that of Thomas McCloskey has been allowed among the liens under the state law, that claim having also intervened there.

The claim of Thomas Adley having been objected to, I have disallowed, the service being in no sense maritime in its character.

The claim for wharfage was not disputed, nor any objection made thereto : and that for hospital dues, though not presented in any formal manner, it was agreed by the counsel of the parties, should be allowed.

Before proceeding to consider the objections urged against the several libels filed, I propose to pass upon a preliminary question, which is urged with great zeal—that is, the question of priority between the attachments under the state law, and the mortgage, which has intervened.

It is contended that the Act of Congress of July 29, 1850, was designed to give a recorded mortgage priority over everything but a strictly maritime lien against the mortgaged vessel ; that the recording operates as a delivery of possession, and that claims of domestic creditors, such as are provided for by the state law for attachment of vessels, not being recognised and enforced in admiralty, must be postponed to a recorded mortgage.

We must then examine the question of priority thus raised.

I may state that on or about July 14, 1861, the steamboat Collier was attached by the sheriff of Allegheny county upon process issued out of the District Court and Court of Common Pleas of said county. Subsequently, on the 1st day of March, 1861, by consent of the libellants and intervenors in said counts (as will appear by copy of their agreement, part of the testimony filed), the lien of the sheriff was released, and the vessel attached by the marshal upon process out of this court.

By this means, the attachments out of the state courts have arisen, and been brought here for allowance, rather informally, it is true, but yet without any objection as to the mode pursued.

By the established law, and by virtue of the 12th Rule in Admiralty, ordered by the United States Supreme Court, “where by the local law, a lien was given to material men for supplies, repairs, &c., the libellant might proceed against the ship and freight *in rem*” with all the effect and rights, as though he had an original maritime lien. It was a question in the case of *Dudley et al. v. Steamboat Superior*, 3 Am. L. Reg. 629, whether those having original admiralty liens, and those who obtained theirs under the local law did not occupy the same rank of privilege. Under such a state of the case, it would seem clear that

the liens given by the municipal law, if enforced in admiralty would take precedence of a mortgage. Now, by the modification of the rule, ordered to take effect about a year since, the remedy in admiralty only would seem to be taken away: there would seem to be no reason why the modification should have at all impaired the rights of such libellants, as against the remnants and surplus remaining in the registry after satisfaction of the maritime liens.

But let us consider the nature of a mortgage of this character, and the arguments advanced in its support.

The precise status of a mortgage of a vessel in a state, where, as in Pennsylvania, there are no statutory provisions for its enforcement, would seem to be a matter surrounded with considerable doubt. The mortgagee cannot proceed in admiralty by libel to enforce his rights. He may be a claimant against libels filed, or he may intervene against the proceeds of the mortgaged vessel. His remedy in any other case would seem to be solely by action in debt, or in equity: *Bogart et al. v. Steamboat John Jay*, 17 How. 401; *Schuchardt et al. v. Ship Angelique*, 19 How. 241. He cannot, therefore, have a maritime lien in the correct meaning of the term.

But it is contended that the privileges of such a mortgage have been much enlarged by the Act of Congress, passed July 29, 1850, and that since its passage, such mortgage is entitled to payment out of the surplus, next after a bottomry bond. I have failed to perceive the accuracy of this argument. That act provides that "no bill of sale, mortgage, hypothecation or conveyance shall be valid against any person, other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale be recorded." There is also a proviso that the lien by bottomry "shall not lose its priority, or be in any way affected by the provisions of this act." To my mind, this act has rather restricted than enlarged the energies of an unrecorded mortgage, and that such was the effect intended. Nor can it be claimed that the act intended to confer any greater rights upon a mortgage recorded under its provisions, than it possessed while unrecorded, before its enactment. It does not say that it *shall* enjoy such and such privi-



leges, if the terms of the act be pursued, but that it shall not have such and such rights, unless a prescribed process be observed. This would have been absurd, had it not been supposed that these rights did attach to the mortgage (though unrecorded) before the passage of this act. For instance, the recording of such a mortgage would now visit with notice of its existence a subsequent purchaser from the mortgagor, while an unrecorded mortgage would be of no avail against him, without he had express notice thereof. Before the passage of the act, such unrecorded mortgage was considered good against even a *bond fide* purchaser without notice.

It is argued, however, that the proviso to the first section contains the necessary implication, that were it not for its terms, even the lien by bottomry, if unrecorded, would have been postponed to a mortgage, and hence the latter must at least follow next in rank to bottomry. This is answered, in the first place, by the view already taken, that the act was not intended to create any new rights in behalf of such contracts; and, also, by the fact that the proviso was doubtless intended only to clear up a doubt that might have arisen from the general words of the act, whether lien by bottomry might not have been included within its terms, and the necessity enjoined upon the holders of such securities to record them, in order to render themselves safe. Again, a bottomry bond has priority over the liens of material men, upon a foreign vessel; and to elevate a mortgage to the next rank, would require that it too should postpone material men. It is quite clear that it never possessed any such energy, for it can only proceed against the remnants after such claims are fully satisfied: *The Charles Carter*, 4 Cranch 328; 19 How. 241; 9 Wheaton 635.

The Act of 1850 was not passed to marshal the liens which arise under the maritime law, or to classify maritime contracts. Its purpose was very different from that suggested by the argument I have sought to answer. It was designed to set at rest many of the troublesome doubts that hung around the rights and liabilities of the mortgagees of vessels, and to prevent the continuance of secret liens upon such property; impairing its value, and often bringing heavy losses upon innocent purchasers.

Its operation would seem to include every case where a transfer or encumbrance, absolute or qualified, is made in writing, and therefore, capable of being recorded, with the exception (arising from its very nature) of a bottomry bond, created in a foreign country, for the sole purpose of furnishing "wings and legs to the forfeited hull to get back for the benefit of all concerned," and expiring with the life of the vessel. It will be seen that the act creates no new privileges for even this favored maritime contract, but it is left with precisely the rights it had before, or to use the terms of the proviso, "not in any way affected by its provisions."

Every consideration which would favor the priority of those furnishing supplies or repairs in a foreign port over a mortgage, will apply with almost equal force in favor of the priority of the material man in the home port, as against the remnants or surplus, to which both he and the mortgagee must alike look for relief. He, too, furnishes the substance, needed to preserve the life of the vessel; he, too, enables her to perform her maritime mission "to plough the seas, and not to rot in the docks;" and he, too, surely should be enabled to look to that, to whose value his means and his labor have contributed, as against one whose claim may have arisen from circumstances far removed from the maritime uses of the vessel.

Should we regard a mortgage of a vessel as a defeasible bill of sale, it would seem entirely clear that no greater rights could be ascribed to such qualified owner, as against material men, than to one having the absolute property in such vessel. As the vessel is liable in the hands of the owner to a lien under the state law for materials, &c., there would seem no sufficient reason why a mortgagee should stand in any better attitude as to such creditors.

Moreover, the amended 12th Rule in Admiralty, before referred to, which allows to material men in the home port a proceeding *in personam*, recognises the existence of a right enforceable in admiralty, which we have seen is not the case with a mortgage.

I would refer to the case of the brig Minnie, 6 Am. Law Reg. 334, where this subject is ably examined, and also to Reeder v. Steamship George's Creek, 3 Id. 232. The rule laid down in

lien ; for section 5 of the act reads : " the taking or receiving of any note, &c., in settlement of a debt comprehended in any of the above enumerated classes shall in no wise invalidate the lien given by this act." It seems to have been the purpose to give the mechanic as many securities for his repairs, &c., as the debtor had it in his power to offer, and yet that the lien should still subsist against the vessel for the two years specified in the act. The policy of such a discrimination in favor of one class of creditors may well be debatable, but I have had no difficulty, from a careful study of the act under consideration, in arriving at the conclusion above expressed.

There will be found filed with the testimony in this case exhibit " X., J. H. B. Clk." a receipt of G. B. Kurtz for the amount of his claims against both the Collier and Vulcan, to the effect, " Dec. 18, '60, rec'd payment." This receipt is explained in the evidence to have been not for money, but for a note received for the gross sum of his demands at that date. As a question of fact I have no difficulty, from the testimony on this point, in determining that " there was no contract to take the lesser security and release the better;" that " there was no consideration given or intended to be given for the relinquishment of one of the mechanic's securities, nor did such an act enter into the contemplation of either of the parties at the time of the settlement." Under the ruling in such circumstances of Grier, J., in *Sutton et al. v. The Albatross*, 1 Phila. 423, the giving of the receipt in this case cannot deprive the mechanic of his lien.

These considerations dispose of the demands of the following parties :

G. W. Coffin, G. W. Motherall & Co., G. B. Kurtz and J. H. Jenks.

Long & Duff, it seems, settled with the owner of the two boats every six months, and if the account was large enough, received a note for the amount ; hence they hold several securities of this character, the last of which is not due. It also appears that when one of these six months' notes would mature, the same would at times be renewed or extended by a new note, if the boat owner's necessities demanded it. It does not appear that any of these notes, at any time, passed from the hands of Long

& Duff, except into that of the owner, when a note was lifted or renewed.

It is contended that where the note originally given has passed into the hands of the maker, by renewal or otherwise, the lien for that indebtedness is gone.

Andrew Adley's case differs from that of Long & Duff in that, for his own accommodation and benefit, he discounted his notes received with some of the banking institutions of the city. The note given at January last was also discounted, but was lifted before maturity by Mr. Adley.

There is a class of cases here which differ in important particulars from most of those considered above, but the points raised in the last two cases will be covered in the consideration of this class, which includes Fitzsimmons & Morrow, J. S. Pringle, A. Hartupée & Co., Douglas & English, J. Irwin & Sons, and William Nelson. These cases differ somewhat among themselves in their details, and I may lean a little more strongly against a particular case than the facts proven may warrant. With this explanation, the facts respecting these cases, as well as I can gather them, seem to be as follows :

Notes were given generally every six months, upon the settlement of the account between the parties arising out of repairs, &c., to the two boats for the current half year. These notes were discounted for the holder's benefit. When one of these notes would mature in the hands of the banking company, or was about to mature, the maker would call upon the original payee of the paper and obtain his endorsement upon new paper for the whole or some less sum, as he might be able to pay a part upon account. This new paper the owner of the boats could get discounted, and with the proceeds would lift the preceding note. In some, if not all, instances the first paper given was a note by D. Bushnell, agent, the owner of the boats, Jos. Bushnell, residing in Cincinnati. When this would mature, a draft by D. Bushnell, agent, on Jos. Bushnell, Cincinnati, would be the paper upon which the endorsement of the lien creditor would be obtained, and so each time a note or draft would fall due; Jos. Bushnell thus apparently meeting his paper at Cincinnati as it matured. The drafts were generally discounted at Pittsburgh,

and the proceeds transmitted to Cincinnati, to take up the old draft.

In all the cases thus far spoken of, without exception, the notes or drafts, representing the existing liability for which a lien is claimed, are the property of the several libellants, and also with the exception of J. Irwin & Son and Douglas & English have been brought into court, and are now in the possession of the clerk of this court.

It is contended upon these facts, that these libellants are but the accommodation endorsers of Mr. Bushnell, and in such relation, their original lien is gone.

There is really no substantial difference between these cases and that of Mr. Adley. It can make no difference to the creditors or defendant whether Mr. Bushnell got new notes discounted with the endorsement of A. Hartupée & Co. upon them and paid the discount, or whether he renewed the notes directly with A. Hartupée & Co., adding in or paying to them the discount, and they subsequently got them discounted. A. Hartupée & Co.'s liability would be neither greater nor less in either case, and their relation to all the parties to the transaction would be precisely the same.

In the view I have taken above respecting the design of the legislature, this giving of notes for an existing demand, which would entitle the party to a lien upon the vessel, is to be regarded as entirely a collateral matter, which can in no way work a satisfaction or extinguishment of the lien within the two years, given by the act, until the indebtedness represented by such notes be actually paid. Regarding this then as collateral matter, no transactions between debtor and lien creditor, respecting these notes, save payment, can invalidate the lien of the mechanic, so long as the notes remain in his hands, or as in this case, are in his hands, at the time he claims upon his original demand, ready to be brought into court and surrendered. How far the holder of such note could be considered the assignee or endorsee of a boat note, entitling him to a lien in the third class of section 1 of the act, is an entirely different question.

To put any other construction upon this act, would be to enforce a technical rule to the injury of the parties for whose benefit

the act was designed, not only, not in pursuance of the requirement of the statute, but in conflict with its spirit, and for the benefit of creditors, whose rights have been in no way affected or impaired by the acts of the mechanics to whom the notes were originally given.

In the case of A. Adley (just considered with others) in the July note, 1860, he gave a receipt, "received payment," (exhibit "J. H. B. Clk.") which is explained by the testimony that no money was paid therefor, and also by receipt in the case of the Vulcan, into which the Collier account thus receipted is carried, and receipted, "received payment by note at four months," thus showing the whole transaction. Such a case, as we have seen in that of G. B. Kurtz, cannot affect the claim of the mechanic to his lien.

The libel of Thomas Snowden shows that for the work done and materials furnished by him, a draft was finally given, being the renewal of a note first given, and that said draft is in the hands of and is owned by Park, McCurdy & Co. Treating Park, McCurdy & Co., as the real libellants, the question arises, have they a lien for this draft in their hands?

I have allowed this claim under the express language of the 5th section, which provides, "that the taking of any note, &c., in settlement of a debt comprehended in any of the above enumerated classes," shall not invalidate the lien given. The original note in the hands of the assignee of the mechanic being within the third of the "enumerated classes," the taking of the draft in "settlement" of the same, would seem to fall within the 5th section, being for "a debt comprehended" in the third of "the above enumerated classes."

It is contended that for all claims for work, materials, or supplies, the admiralty rule, that the libellant must prove that all such things furnished were necessary, should be applied. In the first place, it may well be urged that the parties having proven that the materials, &c., were ordered and furnished and used upon the boats, and that from their nature the materials seem to be necessities, this would be a compliance with the rule, and moreover, the act provides a lien for "all debts contracted by the owner, &c., for or on account of work and labor done,

&c., in building, equipping, &c., of the boats ;" and therefore it is not at all important to the mechanic whether they were necessary or not. It is sufficient for him that they were ordered and furnished, and it is no fault of his, if useless things were furnished. The debt therefore has been contracted, and that fact entitles him to his lien.

The only two remaining libellants in the state courts are the Citizens' and the Monongahela Insurance Companies. It will be seen by the Act of 1858 that insurers of a vessel seem to have got in by one of the not infrequent mistakes in this act. They come in the third class, but unlike the others, they draw their lien from the fact that they have taken a note for the insurance, and not because of the insurance, and without the taking of the note they would have no lien. As the note then is their principal contract, I think that should be specific and individual, and not so commingled with other transactions as to be indivisible. It is not enough to be able to say, "here is a note for \$1000, in it there is included for insurance of the Collier \$200." You could not extinguish the original debt, viz, the note, in the higher security, viz, the judgment, and have it delivered over to the debtor upon paying the judgment ; for a portion of it is for matters not involved in the judgment at all. It seems to me that the libellant should be able to come into court, and present the ground of his demand, entirely distinct from every other transaction.

The claims of the insurers here, are to be found in two or three different notes, united as in the instance of the Citizens' Insurance Company, with other premiums and discounts. The last notes held by each, however, come within the rule laid down above. These are separate from all claims arising from other sources, and these I have allowed, deducting the abatement for returned premium, the boats having been sold before the expiration of the risk.

All of the account, filed in the case of J. Irwin & Son, except the last two items, was furnished for the steamboat Black Diamond, which boat it seems was taken to pieces and considerable portions of her used in the construction of the Collier.

It is contended that the lien for supplies will attach to the

parts of the vessel, and should be paid out of the proceeds of the Collier.

I have not been able to perceive the force of the position, and have, therefore, rejected all items that were not expressly furnished to the Collier.

The sheriff of the county, in making up his costs in this case, has taxed \$11 16 in each intervening claim. Exception has been taken thereto.

It appears that this sum is made up of

Attorney's fee,	. . . . .	\$3 00
Writ,	. . . . .	1 25
Prothonotary's costs,	. . . . .	1 91
Sheriff,	. . . . .	5 00
Total,	. . . . .	<u>\$11 16</u>

It appears that the state act, establishing the fees of the sheriff, has made no provision for the case of attachments of vessels, and the sheriff has charged the fees usually taxed by marshals of the United States.

Taking, however, the fees allowed the sheriffs for our guide, he could be entitled to no more than one dollar for each service, and having two parties here, upon whom to serve the monitions, I have allowed that sum for each.

I can see no warrant for allowing an attorney's fee to each intervenor, thus making several attorney's fees in one case, and that is not the practice in this court, and should not be any where. I have therefore, struck out this fee and taxed in the case of each intervenor as follows :

Writ,	. . . . .	\$1 25
Prothonotary,	. . . . .	1 91
Sheriff,	. . . . .	2 00
Total,	. . . . .	<u>\$5 16—instead of \$11 16.</u>

Whereupon, I, John H. Bailey, clerk of the said court, do respectfully certify and report, that I have as above set forth ascertained the amounts due the several libellants and intervenors in this cause, and I do further certify and report that the



schedule hereunto annexed, and marked "A," and made part of this, my report, contains a statement and account of the moneys so found due the several parties as aforesaid, to which for greater certainty I refer. All of which is respectfully submitted.

JOHN H. BAILEY, *Clerk*.

The following opinion (McCandless, J.) approving and adopting the views set forth in the report of the commissioner, was filed July 16, 1861.

PER CURIAM.—I have considered this case, and the report of the commissioner is confirmed for the reasons assigned by him.

A final decree is ordered accordingly.

An appeal in each case having been taken to the Circuit Court, the following opinion was delivered, December, 1861, by

GRIER, C. J.—These cases involve the same questions, differing only in immaterial circumstances. The very able report of the master was confirmed by the District Court. The exceptions to that report, and the principles on which it is founded, are now to be considered:

1st. The claim of the libellant, as pilot, was properly allowed. The attachment and lien creditors might have intervened as claimants, in the original suit, and contested the libellant's claim for wages against the vessel. But they have not done so. They are now before us only *ex gratia*, on petition to have the remnant of the fund in the registry of the court delivered to them according to the order of their respective claims. The District Court might have relieved itself of the trouble of distributing this surplus by ordering it to be delivered over to the sheriff, who had attached the vessels on domestic liens.

But the proceedings in the state courts being withdrawn, the petitioners may call upon the court to appropriate the fund to those entitled to receive it: *Schuhardt v. Babbidge et al.*, 19 How. 239.

2d. The chief complaint against the appropriation made by the master's report, is, that he has postponed the claims of the mortgagees to that of the other lien creditors.

The Act of Assembly of 1836, relating to the attachment of vessels, subjected them to a lien for work done in repairing, furnishing and equipping them, &c. ; but limited this lien or privilege to the commencement of her first voyage. On the 20th April, 1858, a supplement to this act was passed, applicable only to vessels navigating the rivers Allegheny, Monongahela, or Ohio, in this state, by which they are encumbered with liens for every possible debt or contract made concerning them. They are ranged into five classes, too large to be specially enumerated, and it is not necessary for the purposes of this decision. It is sufficient to say that all the debts claimed as liens, came within the act, except the mortgages.

We need not speculate on the regard that would be paid to these secret domestic liens in a port of another state, or in case of a purchaser without notice at a foreign port.

By this act these secret liens, with which the boat may be covered, have a life of two years given them, whether she remains within the state or home port or not.

The maritime liens being first satisfied, the surplus in the registry of the court should be distributed to the parties having these liens, in their order.

By the law of Pennsylvania there can be no valid mortgage of a chattel unless possession accompanies the deed, and the Act of 1858 gives him none.

If the mortgagee were in possession he would be treated as owner and be personally liable for the debts of the boat. This act makes the boat debtor for everything done to or for her, and these liens would attach to the boat whether in his possession or that of the mortgagor. A mortgagee may take possession of the vessel by virtue of his deed, but till he does so he has neither a general or a special property, any title to, or lien upon the boat. The Act of Congress of July 29th, 1850, which requires every bill of sale, mortgage, hypothecation or conveyance of a vessel, to be registered or enrolled, in order to have any validity as against a purchaser without notice, does not give force or validity to a domestic mortgage of a vessel which it had not by the law of the place where it was executed. The sole object of this Act of Congress is to protect purchasers against secret liens. Whether

the hypothecations or liens given by this Act of Assembly could have any validity even here, as against a *bond fide* purchaser without notice, unless they had been registered according to the Act of Congress, we need not here decide.

In many states a mortgage of a chattel is a valid security without possession. But to have any effect except *inter partes*, and those having notice, this act requires their registry. If it were not a valid lien or hypothecation by the state law, the Act of Congress gave it none. The registry of these mortgages consequently gave them no more effect than they had before. It was only notice to a purchaser that the mortgagee had no lien.

The mortgagees in this case had no right to claim the money representing the boat till all just claims, which were debts of the boat, having a lien on it by virtue of this Act of Assembly, have been first paid and satisfied. The balance, given to the mortgagees, is given because, as between them and the owner, they would have a right to take possession of the boat, subject to the liens, and consequently may have the balance of the money representing her.

It is objected that many of these accounts, for which this boat was attached, had lost their lien in consequence of notes given by the owner, which were renewed from time to time but not paid. To this objection the fifth section of the Act of Assembly referred to is a complete answer, viz: "That the taking or receiving of any note, bill of exchange, or other writing, in settlement of a debt, comprehended in any of the above enumerated classes, shall in no wise invalidate the lien given by this act, but the same shall exist in full force and effect, as if no such note, bill of exchange or other writing had been given."

Although the master of a vessel as such has no lien for his wages, by the maritime law, this act gives a preference "to all hands or persons employed" on a boat, whether as "master, clerk, or otherwise," consequently his wages as such master were properly allowed, for the three months.

On these western rivers, a boat must be always under direction of a pilot, and in many cases, the pilot performs the functions of master, having a certain established rate of wages, for his services as pilot, and an addition thereto for his services as master. For

the first, he may have his lien by the maritime law, for the latter, he has a preference by the local law to the extent of three months' wages.

I see no reason why an assignee of any of these accounts for which a lien is given, may not have a right to stand in the place of his assignor. It is true the thing is not legally assignable, but a court of admiralty regards equitable claims with the same favor as a court of chancery.

The objection by the insurance companies is also overruled. There is nothing on the face of the report to show a mistake of law or facts, and nothing produced before this court to show error.

The bills, bonds, notes, &c., enumerated in the third class of liens, must "have been signed and given in the name and for and on account of such ships, &c."

The master very properly says that where "the note is the evidence of the contract which binds the boat it should be specific and individual," and that "it is not enough to present a note of \$1000 with the allegation that it includes \$200 for the insurance of the Collier." We see no error in this decision.

The exceptions to the decision of the master, with regard to the accounts of Fulton & Son, and of Irwin & Son, which were in part over two years old, are also overruled, for the reasons stated in the report—a bill of goods furnished to a boat, when in port in 1860, cannot be tacked to other bills, made in 1858, more than two years ago, to save the whole from the limitation of two years.

The judgment of the District Court is therefore affirmed, and the clerk is ordered to pay the money in court according to the report of the master.

*In the Common Pleas of Erie County.*

COMMONWEALTH EX REL. GRAY & FARRAR v. THE BANK OF  
COMMERCE.

SAME EX REL. SANFORD v. SAME.

(Vol. IX., p. 225. 1862.)

1. Where the proper officers of a bank absent themselves, and demand is made during business hours for the payment of its bills in specie, and refused by the person in charge not an officer, his offer to endorse the demand and refusal on the bills is not sufficient in law, and would not bind the bank, and the holder is not deprived of his remedy, under the Act of 16th April, 1850, by refusing to allow such endorsement.
2. Under such circumstances, on complaint of the creditor, it will be held that there was a demand made on the bank for the redemption of its bills which was refused, that there was a wilful evasion to endorse the bills thus presented for redemption, and that the bank should go into liquidation.

THESE were proceedings under the 27th section of the Act of 16th April, 1850, commonly called the General Banking Law, to compel the Bank of Commerce to make an assignment to trustees and thus work a forfeiture of its charter.

The facts are sufficiently set out in the opinion of the court. The causes were argued together December, 1861, by *Wm. S. Lane* and *Spencer & Marvin* for relators, and by *Galbraith & DeCamp* for defendants.

The opinion of the court was delivered, January 9, 1862, by

DERRICKSON, P. J.—Some parts of the Act of April 16, 1850, and especially those under which we are acting in the present proceedings, have not been drawn with that care and accuracy which could be desired, but they are not so obscure as to prevent an understanding of the intention and object of the framers of the law; and having ascertained these we must see, as far as we can, that the law is duly executed. Banking privileges had been created by previous legislation, but never apparently arriving at a perfect system for it, the legislature was ever and anon creating new enactments, with the hope of giving security to the public against those banking institutions, which from some cause

or another might become dangerous to the community. It was with a view to this, doubtless, that the act in question was enacted. The 24th section of it subjects the bank to an absolute forfeiture of its charter for a refusal to redeem, on demand made, its notes and liabilities in gold and silver. It does not, however, point out the manner in which this forfeiture is to be made effective, and the omission has given rise to doubts whether it can be done in any other way than through a judicial process, at the instance of the attorney-general; but though that officer may, for the simple suspension of specie payment, proceed against a bank and have it closed, while the law makes no provision for further action in a case of this kind, we think the 27th section indicates the course to be pursued, through the agency of any private citizen who may feel himself aggrieved by the action of the bank. For if the bank passes into the hands of assignees, whether indicated by the court or the officers of the institution, the forfeiture is as effectual and positive as if there had been an adjudication or decree of forfeiture, and doubtless this was the mode contemplated by the legislature; but its ascertainment is more the result of inference and construction of the whole act, than of clear and well defined language. The 25th section increases the rate of interest to be paid by the bank on its bills and liabilities, which it neglects or refuses to redeem, and imposes upon the chief officers thereof the duty to endorse on the bills, &c., the day and year when payment thereof was demanded, and to subscribe their names thereto. The penalty inflicted by this section, for a neglect or refusal to do this, is not to be taken as a substitute for the forfeiture of the charter, but as a personal chastisement upon those officers, for which they can seek no remuneration from the bank. The object of this penalty is to insure compliance with the rest of the section of the act which creates it. The 27th section is the more remedial one, and defines the mode of procedure, which is as summary as could be reasonably desired, and is admirably designed to keep banking institutions in wholesome checks. It requires that the complainant shall set forth in his petition that he had presented his notes, bills or other evidence of indebtedness to the proper officers of the bank, and demanded payment in gold and silver, but which had been refused; and

this being verified by the complainant's affidavit, a citation is to be awarded, returnable within eight days; and if the court or judge passing upon the matter is satisfied of the truth thereof, and that the provisions of the 25th section have been wilfully violated, the directors of the bank shall make an assignment of all its estate, subject to the approval of the court. This being done, the chartered rights of the bank become at once forfeited, except so far as any of them may be necessary to the winding up of its affairs, the proper disposition of its assets and the payment of existing liabilities. But for all other purposes, the bank is as defunct as if it never had had existence; and here and in this manner it is that the 24th section becomes effective and operative. These three sections, then, the 24th, 25th and 27th, are to be taken as a whole, and not separately, for distinct judicial action thereon; for if they should be, it is not easy to see how a legitimate end could be arrived at. The petitions on which the proceedings before us have been instituted, are in form and substance unexceptionable, and the service of the citations issued on them have been duly returned by the sheriff. The evidence which we have heard is, that the bills or notes mentioned in them were presented at the counter of the bank, during the proper hours, and payment thereof in specie demanded, and the same was refused by the young man Osborn, the only person in charge, who said there was nothing to redeem with, but that he would endorse them. He was asked if he was an officer of the bank, and replied that he was not, but was put there by Mr. Reed, the cashier, who was then absent, and had been so, at his home in the state of New York, for about two months, and that he did not know who the president, vice-president or directors of the bank were, but that he was authorized by the cashier to endorse bills.

The cashier himself has been examined, and he says that when he left, some two months ago, to attend a sick wife in the state of New York, he put a young man in the bank and wrote to Osborn to come and take charge of it, and to attend to all matters of business for him; and when he returned he found him there.

Do these acts evidence that violation of the provision of the 25th section there spoken of? One thing it certainly does evi-

dence, that the bank was not in very active or efficient operation, or that its concerns were very carelessly attended to; and further, that the holders of its bills were then seeking their redemption, which they could not obtain. Was the offer of Osborn to endorse the bills sufficient in law, and did the refusal to allow him to endorse cut the applicants short of the remedy they are now seeking? This can be best answered by asking another question: Was Osborn the "proper officer" mentioned in the act to make endorsement, or was he an officer at all of the bank? Certainly not. The cashier could not depute him to endorse the bills, or appoint him to any particular office or clerkship in the bank. This could only be done by the directors. The president or cashier could authorize any one to endorse the day and year on the bills, but one or the other must put his own name thereto, and this could not be done by a substitute. Such is the positive law on the subject. An endorsement by Osborn would not have been binding on the bank, and could have been repudiated at pleasure by its officers. In the next place, was there a wilful evasion, neglect or refusal to endorse the bills? This must be determined by the acts connected with the entire transaction. It is not customary, nor is it contemplated by the banking law or its policy that it should be so, to have banks, for months at a time, without the care and attention of one or more of its chief officers, to transact the ordinary business of banking, the discounting of notes, redeeming of bills, adjusting of accounts, &c., &c. And if any one is so left, without a responsible head or officer, and bill holders or others alike interested, call and receive no satisfaction whatever, to what other motive or intention can this be referred, than to a wilful or purposed and intended one to evade the requirements of the law? The law is not so charitable as to construe acts of such a character as wholly unintentional and accidental, and thus allow creditors to be kept wholly at bay, and at the same time permit the bank to retain all its chartered rights. The conclusion we have come to is, that there was a demand made on the bank for the redemption of its bills, which was refused, and also that there was a wilful evasion to endorse the bills thus presented for redemption, and that the bank should go into liquidation either by making an



assignment on or before the 17th January, 1862 (fixed by consent of parties), or if the same is not done, the court will, at the expiration thereof, appoint a trustee to take charge of its effects.

See Commonwealth ex rel. v. Bank of Commerce, *supra*, 322.

*In the District Court of the United States for the Western District of Pennsylvania. In Admiralty.*

MCGINNIS v. THE STEAMBOAT GRAND TURK.

(Vol. IX., p. 257. 1862.)

1. A sheriff's sale of a steamboat does not discharge the lien of sailors' wages.
2. Otherwise, if the wages are due to the owner of the boat.
3. A father may maintain an action, in admiralty, for the wages of his minor children, but it is a right which may be renounced or forfeited.
4. He may renounce it by voluntarily allowing his child to have the exclusive use of the fruits of his own industry; or he may forfeit his right by neglecting to perform those duties which are the foundation of that right.
5. A watchman, not during the navigation of the vessel, nor when she had her cargo on board, but exclusively in a home port, at the marine railway and when she was laid up for repairs, has no lien for his wages.
6. This is not maritime service. It is the work of a landsman, rather than a sailor. It is completed before the voyage is begun, or after it is ended. It is, therefore, not a maritime contract which can be enforced in a court of admiralty.

THIS case was argued by Mr. *Woods* for the libellant, and by Mr. *Barton* for the claimant.

The facts sufficiently appear in the opinion of the court, which was delivered by

M'CANDLESS, Dist. J.—The libellant, a minor, by his next friend, R. B. Cool, sues for wages as a watchman, on board the steamboat Grand Turk, of which William McGinnis, his father was the owner. The interest of the father, was by a judicial sale and subsequent conveyance, vested in George W. Coffin, who intervened to resist the payment.

As a general principle it is not denied, that the lien of a sailor's wages is not discharged by a sheriff's sale: 2 Wallace 593; but it

is contended, that the son being a minor, the wages were due to the father. If this be so, a sale by the sheriff confers all the title which the defendant in the execution had, and is equivalent to his own deed with special warranty. The case would then present this bare proposition. Can a vendor for a consideration paid, retain a lien against property, which he has thus sold and delivered, in the hands of his vendee; and that too, for a debt due by himself to himself. Certainly he can not, for when a chattel is sold and delivered to the vendee, the vendor has neither *jus in re*, nor *ad rem*, neither a property in nor a lien on the thing sold: 2 Wallace 596.

In the present case, this all depends upon the relation subsisting between the father and the son. As a general proposition, it is undoubtedly true, that the father is entitled to the earnings of his children during their minority, nor is there any doubt that he may maintain a suit in admiralty for their wages, earned in maritime service: 4 Mason 380. But this is not, like the duties of a parent, a right indissolubly attached to the paternal relation.

It is a right which may be either renounced by the father or forfeited. He may renounce it by voluntarily allowing his child to have the exclusive use of the fruits of his own industry, and he may forfeit his right by neglecting to perform those parental duties which are the foundation of that right: Ware 476. The proofs have shown clearly that for two years the father permitted the son to hire out, receive his own wages and to have the control of his own actions; and it does not appear that this renunciation of the parental guardianship was attended with any results prejudicial to the minor. If the case depended upon this point, the libellant would be entitled to a decree, for courts of admiralty will always take care of the interests of minors, even against the grasping disposition of their parents.

But there is a bar to a recovery here, which meets us at the very threshold. This is not a maritime contract which can be enforced in a court of admiralty. The libellant was a watchman, not during the navigation of the boat, or while she had cargo on board, but exclusively in a home port, at the marine railway, and when she was laid up for repairs. This was no maritime

service. It was the work of a landsman rather than a sailor. It had nothing to do with the navigation of the vessel; no part of the services being rendered while the vessel was in motion. Like the case of *The Owens*, 1 Wallace 870, decided by my brother Grier, "the services are performed on a contract which is neither made at sea nor for service to be performed at sea; both (that is, the contract and service) were in the port of Philadelphia and within the county of Philadelphia. The ship was safely moored at the wharf, and was in the actual possession of the owners; the service had no agency in bringing her in; he was not carrying freight."

For these reasons (which are quoted from Gil. 8), with others, the court decide that a seaman, whose wages have been paid up to the termination of the voyage, but who afterwards remains on board the vessel moored at the wharf, has no claim for services which a court of admiralty will enforce. The service performed here by the defendant, as watchman, is in no sense maritime. Like that of the stevedore, "it is completed before the voyage is begun or after it is ended," and has none of the characteristics of a maritime contract.

The libel is dismissed with costs.

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*In the United States District Court for the Western District of Pennsylvania.*

UNITED STATES v. ROBERT DUNCAN.

(Vol. X., p. 41. 1862.)

1. Act of Congress of 28th February, 1839, authorizing the courts of the United States to relieve bail in certain cases, construed.
2. The courts in England had such power, independent of Acts of Parliament conferring it, which were held by the judges to be simply in affirmance of the common law.
3. The reasoning of Chief Justice Marshall, in 1 Brockenbrough 255, although delivered many years before the passage of the Act of Congress, sustains the power of the court to grant relief, as well after as before judgment.

4. A recognisance is a matter of record, and when forfeited, it is in the nature of a judgment of record, and when judgment is given, the whole is to be taken as one record.
5. In the courts of the United States, the recognisance is estreated and sued in the same forum, and the court having power over the proceedings from the beginning, may grant relief, even after judgment and execution in the hands of the marshal.

*Scire facias* sur recognisance. Rule to set aside judgment and spare the recognisance as to Duncan.

Opinion of the court delivered by

MCCANDLESS, J.—A true bill was found at the May Sessions, 1861, against Joseph Shoemaker, for making and passing counterfeit coin, in the resemblance and similitude of the coin, coined at the mint of the United States. On the 5th day of August, 1861, the defendant, Robert Duncan, and Alexander McGregor, entered into recognisance for the appearance of Shoemaker at the following October Sessions. He failed to appear, and the recognisance was forfeited. On the 26th of October, a *sci. fa.* was sued out, and served on Duncan the same day. No appearance or plea being entered, judgment *nul dicit* was entered, and the sum liquidated by the clerk at \$8000.

Duncan took out a bail piece, and dispatched a deputy marshal to the camp at Indianapolis, where it was alleged Shoemaker was engaged in the public service. As the military there was more potent than the civil power, the deputy failed to arrest him; but at a subsequent period, and after the date of the judgment, he was captured in this city and committed to prison by his bail, where he now remains in the custody of the United States marshal.

An application is now made to relieve Duncan, one of the bail, under the authority delegated to the court, by the Act of Congress of 28th February, 1839, § 6: Brightly 283.

This act provides, that "whenever it shall appear to the court, that there has been no wilful default of the parties, and that a trial can notwithstanding be had in the cause, and that public justice does not otherwise require the same penalty to be exacted or enforced," the court shall have authority in their discretion to remit the whole or a part of the penalty. If the wilful default

here mentioned, was applicable to the act of the prisoner alone, the law would fail to extend relief to meritorious sureties, who, trusting to the integrity of the principal, were found in default, without any act or connivance on their part. The true construction of the act would seem to be, that where there is no collusion with the principal, no aid extended to him to escape, or no effort made to defeat the ends of public justice, the court shall have power, in their discretion, to relieve the surety from the penalty of the recognisance.

Here it appears that Duncan, instead of conniving at the absence of the principal, made every effort to arrest him, and finally succeeding in placing him in the custody of the United States officers.

"A trial can be had" in his case; and, although it is alleged on the part of the government, that owing to the absence of material witnesses, it may not be a successful one for the prosecution, yet the bail does comply with the spirit of his undertaking, in placing the prisoner at the bar for trial. The absence of the witnesses on the part of the government is no default of his, but is one of the casualties to which all suits in courts of justice are subject. It is one of the chances which enure to the benefit of criminals, and one of the misfortunes incident to all public trials.

In the examination of this case, the court has entertained some doubt as to its power to extend this relief after judgment, after it has become a debt of record against the defendant, and in favor of the United States. This power was exercised by the common law courts in England, and statutes were passed extending it, but they were all held to have been simply in affirmance of the common law.

In Viner's Abridgement, vol. 18, title Recognisance, letter D, 167 and 168, it is said, "if a recognisance is estreated into the Exchequer, because not punctually complied with, yet if the party appears, and takes trial at the next session, he may compound for a very small matter in the Court of Exchequer, because the effect, though not the exact form of the recognisance is complied with; judges of the Oyer and Terminer are the proper judges, whether recognisances should be estreated or spared; and it is fo

the advantage of public justice that they should have such power, if upon the circumstances of the case they see fit."

This shows the power exercised before judgment, in the sound discretion of the court. In England, the recognisance was estreated and sued in a different tribunal from that in which it was taken, and an interference after judgment might bring about a conflict of jurisdiction. But in the courts of the United States, the suit is brought in the same forum and subject to the same judicial cognisance. The court has not lost control over its record, and it may extend relief when a proper case is presented for its action.

The opinion of Mr. Chief Justice Marshall, in 1 Brock. 255, was delivered in 1813, before the passage of the Act of Congress heretofore recited, and was an application for relief before the recognisance was estreated, and before judgment, but the whole reasoning of that great chief justice sanctions the exercise of the power as well after as before judgment. In the case of the Commonwealth v. Denniston, 9 Watts 142, the principle is recognised, that a recognisance is a matter of record, and when forfeited, it is in the nature of a judgment of record, and when judgment is given, the whole is taken as one record. The right of the governor, therefore, to remit, cannot be affected by proceeding to judgment on the recognisance, as the nature of the recognisance remains the same, after as before judgment.

This being the case, the Act of Congress affords us ample power in the exercise of a sound discretion, to afford the relief prayed for. And as we are of opinion that the absence of the principal was no fault of the bail, and that he has done all in his power to repair the public injury by the surrender of the prisoner, he is entitled to the interposition of the court, upon payment of costs.

The judgment is set aside as to Duncan, and the recognisance as to him, respited and spared upon payment of all the costs which have accrued upon the *scire facias*.

Commonwealth v. Davies, 1 Binney 97; Commonwealth v. McAnany, 3 Brewster 292.

*In the Common Pleas of Luzerne County.*

## BOGART v. INK.

(Vol. X., p. 44. 1862.)

1. A justice of the peace is not liable in an action for damages for refusing an appeal when the party demanding was entitled to it.
2. The principle of the law seems to be that whenever the law requires the officer to decide upon evidence, whether an act is to be done or not, if he considers the subject, and mistakingly decides wrong, no action can be sustained.

CONYNGHAM, P. J.—This suit was brought by the plaintiff against the defendant, a justice of the peace of the county, to recover damages, because in a certain action brought before the said justice in the name of Dodson to the use of Koons against Bogart, the now plaintiff, he the justice, after rendering judgment in favor of the said plaintiff, refused to take bail, and permit the then defendant to appeal. The plaintiff has now only demanded before the jury nominal damages and received six cents, the court having by the consent of the parties, reserved the point as to the liability in law of the justice, it being agreed that judgment might be entered *non obstante veredicto* for the defendant, should the court eventually be of opinion, that the action could not be sustained at law.

The evidence in the case showed no wilful error upon the part of the justice, but clearly established the fact that if the justice was wrong in refusing the appeal in the original suit, it was an error of judgment, under an apparently honest belief that the then defendant was not entitled to an appeal. The claim of the plaintiff in the suit then before the justice was for less than \$5.33, and so far the defendant would have no right to appeal; but he contends, that he presented an offset for a larger amount, which was overruled by the justice, and that this would give him the right to remove the case to the Common Pleas. The justice made no entry of the proposed offset on his docket, and it is plain from the evidence, that he did not consider the claim of set off properly made and brought to his notice, not as being overruled on hearing, but not properly tendered or introduced to the

consideration of the justice at the time of trial. Taking this view of the case he came to the conclusion, after some delay and consideration, that there being no valid claim of offset, the right to appeal must be controlled by the demand of the plaintiff, and the judgment thereon given by him, the justice; this demand and judgment being less than \$5 38, he determined that the defendant was not entitled to an appeal, and refused it to him. For this refusal this action is brought.

If there was error in this decision of the justice, and we are inclined to think that he did err in refusing the appeal and overruling the application, this court would have remedied the wrong, if application had been made in due season. We are in the constant habit of permitting appeals to be entered where justices mistakenly deny an appeal, but require that application shall be made to the court at the next term after the refusal, the proper time at which the appeal should be filed in the Common Pleas. We would in this case have given the party relief, but he neglected to apply to the court until the second term after the time of proposed entry before the justice, and the court could not then sustain the application.

The doctrine of the non-liability of judicial officers for damages resulting from errors in judgment committed by them, cannot for a moment be disputed; it furnishes an exception to the general rule, that for every wrong, there is a remedy by action at law. General policy and common sense establishes the doctrine beyond all question. We refer to Broome's Com. on the Com. Law, 91 Law Lib. 112, 113; Broome on Actions at Com. Law, 45 Law Lib. 141; *Ross' Executors v. Rittenhouse*, 1 Yeates 458, and a number of cases cited in 1 U. S. Dig. 67, tit. Action, pl. 228-238. The principle seems to be that whenever the law requires the officer to decide upon evidence, whether an act is to be done or not, if he considers the subject and mistakenly decides wrong, still no action can be sustained against him. If the act is merely ministerial, involving no discretion or judgment, and he wilfully refuses, perhaps the case may be different; though even then the proper remedy seems to be by impeachment, and not by civil action. In some instances actions are expressly given by statute, against inferior judicial officers, but these are



exceptions to the general rule, and intended to control them in matters where proper care will always guard them from doing wrong.

Their claimed right to appeal from the civil judgments of justices may be disputed, and in some instances it has required considerable legal examination to decide upon the question of right. Justices, judges of the Common Pleas and the judges of the Supreme Court, in their own decisions, have differed under different appearances of the record and the evidence. We refer to the cases cited in 2 Whart. Dig. 121, title Justices, section 6, pl. 228-240, and to the later case of *Prestly v. Ross*, 1 Jones 410, to show how many nice points and distinctions have been taken in the courts with reference to the right of appeal, depending upon the construction of the acts, under which Justice Ink acted, in deciding upon the question when it came before him. Justices of the Common Pleas have retained and rejected appeals, and the Supreme Court have reversed their decisions, without any one dreaming that the former had thereby made themselves liable to an action for damages. Why should a more rigid rule be adopted with regard to justices of the peace, who certainly will be deemed less qualified to decide upon legal questions. The Courts of Common Pleas are as much bound by statute to take jurisdiction of appeals duly entered before justices, as the latter are to enter those appeals on proper demand.

The decisions we have referred to show that there are cases in which an appeal is allowable, and other cases in which the appeal should be refused; to which class any particular case belongs, depends upon the judgment and decision of the justice, upon the facts before him shown by the record of the case; he is to judge from the evidence before him, whether the appeal may be permitted or refused under the statute. In deciding upon such a question, he acts under his best judgment in law and a legal discretion to allow or refuse the appeal. Can it be correctly inferred that herein he does not act judicially, but only ministerially? We think not. He is not bound to allow an appeal in every case absolutely; in some he is bound to refuse it. He is called upon to think and in his judgment to decide, whether each particular case belongs to the one class or the other, and this most certainly

is to act judicially. It does not impugn this inference, that in the great majority of cases, the cause is so free from doubt, a justice will act almost without reflection, and seem to be doing a mere ministerial act; it is still the exercise of judicial power in pursuance of judicial decision.

In the case before us, there seems nothing to dispute it, but that the justice endeavored to do his duty; that he thought there was no legal offer of any set off before him, which should be entered upon his docket, and therefore that the whole question in dispute between the parties involved a sum less than \$5 33. He may have been, and probably was mistaken; but can he be made liable to a civil action for damages for such a cause? We consider it, in any aspect of the case, an error of judgment, the evil of which might have been avoided had Bogart, the present plaintiff, applied to this court for redress in due season. He neglected to do so, suffered the wrong to pass beyond the reach of a remedy, and we do not see how he can now obtain redress in the present shape. We should be sorry to establish the precedent, that where a justice may have made a mistake in his decision, and the party aggrieved neglects to take the legal remedy to recover or overrule the decision, that he may resort to an action for damages.

The case is one of importance, and we have set forth the reasons for our opinion somewhat at length. It is important that it should be understood by both officers and people, as such a rule best protects the interests of all. One of the authors we have already cited says: "It is necessary to the free and impartial administration of justice, that those who have been appointed to dispense it, should be uninfluenced by fear, and unbiassed by hope. Judges have not been invested with this privilege for their own protection merely: it is calculated for the benefit of the people, by securing to them a calm, steady and impartial administration of justice."

Upon the whole case, we direct judgment upon the record and evidence upon the judge's notes, to be entered in favor of the defendant *non obstante veredicto*.

*In the District Court of Allegheny County.*

## HILL v. BOSWELL.

(Vol. X., p. 57. 1862.)

1. To support an action for words spoken in another state, not actionable at common law, it must be shown that they are actionable by the statute of the state where spoken.
2. The stealing of a promissory note is not a criminal offence at common law; and therefore unless made so by the statute laws of Missouri, words spoken in that state charging such stealing, would not be actionable in Pennsylvania.
3. The declaration in slander must contain a colloquium or averment of the essential facts; a statement of them merely by innuendo would be fatally defective.

*Thomas Ewing*, for plaintiff.

*A. H. Miller*, for defendant.

Opinion, filed August 9, 1862, by

WILLIAMS, A. J.—This case comes before us on the questions of law reserved at the trial and on the motion in arrest of judgment.

The slanderous words laid in the declaration, charging the plaintiff with the larceny of a promissory note drawn by the defendant, are alleged and were proved to have been spoken by the defendant in the city of St. Louis, in the state of Missouri. The stealing of a promissory note is not a criminal offence at common law, and if not made so by the statute law of Missouri, the words spoken by the defendant were not actionable there. In order, therefore, to support an action here, for the words spoken in Missouri, it was incumbent on the plaintiff to show that by the laws of that state the stealing of a promissory note is a criminal offence. The words if spoken here would have been actionable under our statute, but as shown by the authorities cited on the argument, in order to support an action for words spoken in another state, not actionable at common law, it must be shown that they are actionable by the statute of the state where spoken; and as no such proof was given in this case the defendant is entitled to a judgment in his favor on the reserved questions.

But if there were any doubt of this, we should be compelled, under the authority of *Gosling v. Morgan*, 8 Casey 273, to arrest the judgment. The declaration contains no colloquium or averment that there was a conversation or discourse on the part of the defendant touching a promissory note, which had been drawn by him, payable to the order of James H. Brooks, and which had been stolen, connecting the slanderous words therewith. That such a note had been drawn, that any larceny thereof had been perpetrated, or attempted by any one, or even alleged or spoken of, no where appears, except in the innuendo, which is never used to supply the place of a colloquium, but to explain some matter already expressed. It serves to point out where there is precedent matter, but never for a new charge. It may apply what is already expressed, but cannot add to or enlarge or change the sense of the previous words. Whenever, therefore, an inducement, or preparatory statement of the existence of some extrinsic fact, to which the words referred is essential, the omission is fatal, and there must be an innuendo expressly referring to such inducement: 1 Chit. Pl. 407. The declaration in this respect is fatally defective, and the motion in arrest of judgment must prevail.

And now, to wit, August 9, 1862, this cause came on to be heard on the questions of law reserved at the trial, and on the trial, and on the motion of defendant in arrest of judgment, and was argued by counsel; and thereupon, on consideration thereof, it is adjudged and ordered that judgment on the verdict be arrested, and that judgment be entered in favor of the defendant, on the reserved questions, *non obstante veredicto*.

*Bundy v. Hart*, 46 Missouri 460; and see *Townsend on Slander and Libel* 213, and cases cited.

*In the District Court of Allegheny County.*

## GARRARD v. THE COUNTY OF ALLEGHENY.

(Vol. X., p. 57. 1862.)

1. Judgment will not be entered "for want of a sufficient affidavit of defence," where the affidavit of claim is not in substantial compliance with the rule of court.
2. By the 8th section of the Act of 21st April, 1858 (Pamph. L. 387), municipal corporations are relieved from the necessity in any case of filing an affidavit of defence.

*Flenniken, Kirkpatrick and Mellon*, for plaintiff.*Barton*, for defendant.

Opinion, filed August 23d, 1862, by

WILLIAMS, A. J.—This is a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence. It may be that the affidavit filed by the commissioners in this case, as alleged by the plaintiff's counsel, raises no question of fact for the determination of the jury, and, under the decisions of the Supreme Court of the United States, and of this state, constitutes no legal and valid defence to the plaintiff's action. But has the plaintiff, by his affidavit of claim, brought himself within the rule which entitles him to a judgment for want of a sufficient affidavit of defence? He did not file, with his affidavit of claim, copies of the coupons upon which the suit is brought; nor does the affidavit itself contain such a description or designation of the coupons as is necessary to identify them with reasonable certainty. It is true that the declaration, in its several counts, taken together, sets out copies, or what purports to be copies, of the said coupons, and the declaration is annexed to and filed with the affidavit. Manifestly this cannot be regarded as a strict compliance with the literal requirements of the rule; and whether it was a substantial compliance with its spirit is a question we need not decide in this case, as the county, under the provisions of the Act of 21st April, 1858 (Pamph. L. 387), was not bound to file an affidavit of defence. The 8th section of this act repeals all laws

requiring municipal corporations to file affidavits of defence; and though the act is entitled "A further supplement to the Act incorporating the City of Philadelphia," the provisions of this section seem to be of general application. The rule for judgment is therefore discharged.

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*In the District Court of Allegheny County.*

PAINTER v. PITTSBURGH.

(Vol. X., p. 66. 1862.)

Where an injury is occasioned through the negligence of contractors, their workmen or servants, the contractors are responsible; and no action will lie against the individual or corporation for whom the work is being done.

THIS case is sufficiently stated in the opinion.

*G. P. & T. B. Hamilton*, for plaintiffs.

*Slagle & Bailey*, for defendants.

Opinion of the court, filed August 16, 1862, by

WILLIAMS, A. J.—By an Act of Assembly, approved the 22d of April, 1858, the Councils of the City of Pittsburgh were authorized to cause sewers to be constructed in any street, lane or alley of said city, and for the payment of the cost of the same to levy and assess upon the property benefited. Under the provisions of this act, the Councils of said city, by an ordinance passed the 25th of October, 1858, authorized the construction of a public sewer in St. Clair street; and in pursuance thereof, on the 1st of June, 1859, the mayor, aldermen and citizens of Pittsburgh, by their recording regulator, Isaac Morley, entered into a written contract with Messrs. Allen & Kerr, contractors, for the construction of said sewer, by which the latter covenanted and agreed, for the prices therein stipulated, to build a brick sewer and all the necessary inlets, from the south side of Liberty street to the Allegheny river, and to furnish all material therefor.

The contractors began the work shortly after the making of the contract, and in constructing the sewer, excavated, by their workmen and servants, the earth in some places in said street to the depth of twenty feet or more; and to prevent injury or accident, during the progress of the work, they directed barriers and guards to be placed along the sides and across the ends of the trench or excavation, and employed a man for the express purpose of seeing that proper and sufficient guards or barriers were at all times kept up.

On the night of the 28th of June, 1859, George Painter, in passing over and along St. Clair street, fell into the trench or excavation, so made therein, and received injuries of such a character as to occasion his death within a few days thereafter.

This action is brought under the statute and its supplement, to recover damages for his death, for the use of his widow and minor children. The jury have found that the injury, which resulted in his death, was not occasioned by any negligence or default on the part of the deceased, but by the negligence of the contractors, their workmen and servants, in not properly guarding or giving notice of the excavation.

Is the city liable for the death of plaintiff's husband, occasioned, as it was, by the neglect of the contractors, their workmen and servants, employed in the construction of the sewer? This is the main question raised by the points reserved on the trial; and it is one upon which, as it respects the principles governing its solution and their application, courts and judges, both in England and America, have differed in opinion. I cannot find that the precise question raised here has been anywhere decided by the Supreme Court of this state, but it is now settled in England and in some of the states of our Union, by the more recent decisions, that there can be no recovery against an individual or corporation, in a case like the present, for an injury occasioned by the negligence of contractors, their workmen or servants: *Quarman v. Burnett*, 6 M. & W. 499; *Rapson v. Cubitt*, 9 Id. 710; *Winterbottom v. Wright*, 10 Id. 109; *Reedie v. The London and North-Western Railway Co.*, 4 Exch. 244; *Knight v. Fox*, 1 Eng. Law and Equity 477; *Overton v. Freeman*, 8 Id. 479; *Peachy v. Rowland*, 16 Id. 442; *Steel v. The South-East-*

ern Railway Co., 32 Id. 366; Scott v. The Mayor, &c., of Manchester, 37 Id. 495; Scott v. Mayor, &c., of Manchester, 38 Id. 474; Blake v. Ferris, 1 Seld. 48; Park v. The Mayor, &c., of New York, 4 Id. 222; Kelly v. The Mayor, &c., of New York, 1 Kernan 432; Hilliard v. Richardson, 3 Gray 349; Barry v. St. Louis, 17 Mo. 121.

It would involve too much labor, and it is not necessary, to attempt a review of the cases cited, but the conclusion to which they all lead, and which has been reached after the fullest argument, and the most mature consideration, by judges of great learning, experience and ability, is adverse to the plaintiff's right to recover in this action against the city; and though these decisions are not binding as authority on this court, yet they are entitled to very high consideration as evidence of the law, and, in the absence of any authoritative adjudication by our Supreme Court, ought to have a controlling influence in the decision of a question presented now for the first time for our consideration. The very point raised by the evidence in this case, was decided in Park v. The Mayor, &c., of New York, and in Kelly against the same corporation. The negligence which caused the injury resulting in the death of the plaintiff's husband, was that of the servant who was employed to keep up proper and sufficient barriers around the excavation, and for his negligence the contractors by whom he was employed are alone responsible. The plaintiff, therefore, is not entitled to recover, and the judgment must be entered for the defendants. The decision of the main question in favor of the defendants, renders it unnecessary to consider the questions presented by the other points reserved on the trial, but in order to enable the parties to have the whole case reviewed on one writ of error, they are ruled, *pro forma*, in favor of the defendants.

And now, to wit, August 16th, 1862, this case came to be heard on the reserved questions, and was argued by counsel at the last term of this court, and thereupon, on consideration thereof, it is now adjudged and ordered that judgment be entered in favor of the defendants, on the reserved questions, on payment of the verdict fee, *non obstante veredicto*.

Affirmed, 10 Wright 213.



*In the Common Pleas of Allegheny County.*

COMMONWEALTH EX REL. PENITENTIARY v. FLOYD, TREASURER.

(Vol. X., p. 73. 1862.)

1. Writs of execution of the United States Circuit Court for the Western District of Pennsylvania against a county, issued under a rule of that court, adopting, as a part of its civil process, the 6th and 7th sections of an Act of Assembly, relative to actions by and against counties and townships, approved April 15th, 1834, have just the same force and effect as similar writs issued by the state courts.
2. A debt due to the Commonwealth is a claim of the highest order, and cannot be affected either by the Statute of Limitations or a certificate of bankruptcy. Her privileges in this respect, are all such as necessarily result from the prerogative of sovereignty.
3. The treasurer of the Western Penitentiary is but a trustee for the use of the Commonwealth, and a debt due by a county to the penitentiary for maintaining convicts therein is in fact a debt due to the Commonwealth herself; and although a suit brought therefor be in the name of the Penitentiary, the Commonwealth is the actual party plaintiff, and entitled to insist on her prerogatives.
4. The Act of Assembly of the 23d April, 1829, in relation to the Eastern and Western Penitentiaries distinguishes claims for keeping convicts from ordinary claims against counties, and in effect appropriates the necessary amount in the county treasury for payment of such claims.
5. Therefore it is the duty of the county treasurer, to retain sufficient funds of the county in his hands, to pay a warrant for such claim of the penitentiary, in preference to paying the money upon a writ special *fi. fa.* for an ordinary debt, and in case of his refusal so to do a mandamus will issue against him.
6. That funds necessary to defray the ordinary and current expenses of the county, should not be withdrawn from the treasury by mandamus executions, is supported by strong reasons as well as authority.
7. It may well be questioned whether money, levied as our county taxes are for the express purpose of the defraying certain specified current expenses of the county, can be treated as "money unappropriated of the county," except where there is an excess, not required for the payment of the objects included in the estimate.

RULE for a mandamus.

The case is fully stated in the opinion below.

*S. H. Geyer*, for the relator.

*John P. Penney*, for the respondent.

The opinion of the court was delivered September 23d, 1862, by

STERRETT, P. J.—This a rule on the respondent to show cause why a *mandamus* should not issue, commanding him to pay a warrant for \$1440 88, dated February 19th, 1862, drawn by the commissioners, and countersigned by the controller of Allegheny county, in favor of the relator, for expenses of keeping the convicts of the county in the penitentiary.

All the requirements of the law, in relation to the presentation and approval of the relator's account, the drawing of the warrant therefor, &c., appear to have been strictly complied with. On the 18th day of July, 1862, the warrant was presented to the treasurer, and payment thereof demanded. He refused, on the ground that all the money in the treasury was held by virtue of *mandamus* executions, issued by the Circuit Court of the United States for the Western District of Pennsylvania, on judgments obtained against the county for arrears of interest on bonds executed by the county commissioners in favor of certain railroad companies, which writs were served on him before the warrant in question was presented.

In his answer to the rule the respondent admits, that, at the time the warrant was presented to him, he had funds of the county sufficient to pay the same, that he has since received, and now has money, levied and collected for the purpose of defraying the ordinary expenses of the county sufficient to pay the warrant, but not enough to pay it and the writs of the Circuit Court.

The question thus presented is, whether the *mandamus* writs of the United States Court are entitled to payment out of the funds on hand, in preference to the warrant of the relator.

The writs of the Circuit Court were issued under a rule of that court, adopting, as a part of its civil process, the 6th and 7th sections of an act, relative to actions by and against counties and townships, approved April 15th, 1834. Consequently they have just the same force and effect as similar writs issued by the state courts. The 6th section of the act is as follows, viz :

“If the judgment shall be obtained against a county in any action or proceeding, the party entitled to the benefit of such judgment may have execution thereof, as follows, and not other-

wise, viz.: It shall be lawful for the court in which such judgment shall be obtained, &c., to issue thereon a writ commanding the commissioners of the county to cause the amount thereof, with interest and costs, to be paid to the party entitled to the benefit of such judgment, out of any moneys unappropriated of such county; or, if there be no such moneys, out of the first moneys that shall be received for the use of such county, and to enforce obedience to such writ by attachment."

According to the plain reading of the act, it might well be questioned whether it was ever intended to authorize the issuing of a mandamus writ against the county treasurer, or any other officer not named in the act; but the Supreme Court in *Monaghan v. The City of Philadelphia*, 4 Casey 207, has intimated that it may be done; and it is said in that case that, "although cities are not expressly named, yet they are clearly within the spirit of the act," and consequently a mandatory writ may be directed to a city treasurer, or other officer having the custody and control of municipal funds. For the purposes of this case, then, we may assume that the mandatory writs were properly directed to the county treasurer.

The claim of the relator is one of the highest order. It is in fact a debt due the Commonwealth herself. The treasurer of the penitentiary is but a trustee for her use; and although the suit is in the name of the Western State Penitentiary, the Commonwealth is the actual party, and entitled to insist on her prerogative: *Commonwealth v. Baldwin*, 1 Watts 56. It is well settled that a claim of the Commonwealth cannot be affected either by the Statute of Limitations or a certificate of bankruptcy: 6 Barr 293; 10 Id. 468.

In *Commonwealth v. Baldwin*, it was held that the lien of a judgment in favor of the Commonwealth is not barred by lapse of time. An action of debt, for \$10,200, was commenced against Baldwin in 1810, and the defendant confessed judgment in April, 1816, at which time he was seised of lands which subsequently, in September of the same year, he mortgaged to the Bank of Pennsylvania. Upon the sale of these lands in 1830, the money was brought into court for distribution. It was held that the lien of the Commonwealth was unaffected by lapse of time, and the

judgment was paid out of the fund. In this case, as well as others that might be cited, the exemption of the Commonwealth is put on the ground of her prerogative as a sovereign; and in delivering the opinion of the court, Chief Justice Gibson remarks that, without pretending to fix its limits in all cases, it may safely be asserted that this prerogative is a principle of government and a part of the law of the land.

Upon the principle pervading these cases, therefore, it would seem that the claim in this case occupies a higher position than an ordinary debt against the county.

Again, we think it is distinguished from ordinary claims against the county, by the Act of April 23d, 1829, in relation to the Eastern and Western Penitentiaries, which directs that the expenses of keeping the convicts shall be borne by the respective counties in which they shall be convicted. The 9th section, among other things, makes it the duty of the treasurer to accept orders and make provision for the payment of these expenses. It requires the inspectors of the penitentiary to furnish the county commissioners annually, on or before the first Monday of February, with a probated account of the expenses; and the treasurer, upon receiving notice of the amount from the commissioners, is required to collect and retain money to pay the same when the order therefor is presented. It also provides that the order shall not be presented to the treasurer before the first Monday of May.

The provisions of this section are somewhat modified by "an Act relating to Allegheny county," approved May 1, 1861, which requires that all accounts and claims against the county, shall first be presented to and approved by the controller; but the duty of the treasurer, under the former act, "to collect and retain moneys, for the payment" of warrants, drawn for the expenses of keeping convicts, remains the same. The act, in effect, appropriates the necessary amount for that purpose.

In view of the character and position of the demand in this case, and the provisions of the act requiring the payment of such claims, we are of opinion that it was the duty of the treasurer to retain sufficient funds and pay the warrant in question, notwith-

standing the writs of special *feri facias* issued by the Circuit Court.

This might be sufficient to dispose of the case, but one or two other positions in support of the rule may be briefly noticed.

It is claimed that funds necessary to defray the ordinary and current expenses of the county should not be withdrawn from the treasury by *mandamus* executions. There are strong reasons as well as authority for this position. If all the funds in the treasury can be thus withdrawn—leaving nothing to pay jurors, the expenses of the jail and convicts in the penitentiary, and other indispensable current expenses—how is the administration of public justice to be maintained and the machinery of the county government to be kept in motion? It cannot be done. The necessary funds are just as indispensable to the existence of the government as food is to the support of animal life. If the rolling stock and whatever else is necessary to the successful operations of railroads, is held to be exempt from seizure and sale, on the ground of public interest and convenience, should not a similar protection, to a reasonable extent, be given to the treasury of a municipal government? But we are not without authority on this point. So far as our courts have indicated any opinion on this subject, it has been in favor of considering the ordinary current expenses as having the first claim upon the treasury: 6 Binn. 5.

In *Commonwealth ex. rel. Price v. The Commissioners of Philadelphia*, 1 Whart. 1, a rule was granted to show cause why a *mandamus* should not issue, commanding the commissioners to draw an order in favor of the relator for damages assessed in the opening of certain streets. The substance of the commissioners' answer to the rule was, that all the funds in the treasury were required to defray the ordinary current expenses of the county, and that they did not consider it their duty, as public agents, to continue drawing warrants upon a treasury which they know to be in effect empty. The court, in discharging the rule and refusing the writ, says: "It appears by the affidavit of the commissioners that there is no money in the treasury, except that which is wanted to defray the ordinary and current expenses of the county. The writ of *mandamus* is not of course. It will be

granted when a plain case of necessity is shown, and where, in the discretion of the court, it appears to be advisable. It this case we should probably stop the wheels of the county government, if a *mandamus* were allowed."

Again, in *Commonwealth v. The Commissioners of Philadelphia County*, 2 Whart. 285, a similar rule was taken, to which the commissioners, among other things, answered "that there is no money in the treasury which is not wanted to defray the current expenses of the county, and that there is not sufficient even to defray them." The court in deciding that the answer on this point was sufficient, says "the county commissioners must exercise a sound and just discretion in reserving money to defray the current expenses of the county, because they are of the first importance to the welfare of the public."

We are not aware that these cases have ever been overruled; on the contrary, the principles involved in them have been affirmed whenever the question has properly arisen. In *Larimer, for use, v. Pitt Township*, the same doctrine was held by the District Court of this county, in a very able opinion, not published.<sup>1</sup> It was there held that notwithstanding a *mandamus* execution under the Act of 1884, against the auditors of the township, they were fully justified in paying out money of the township, for the support of the poor, repairing highways, and other necessary expenses, and the court refused to attach them.

Again, it may well be questioned whether money, levied, as our county taxes are, for the express purpose of defraying certain specified current expenses of the county, can be treated as "money unappropriated of the county," except where there is an excess, not required for the payment of the objects included in the estimate. The law requires that near the close of each year "an estimate of the probable expenses of the county for the ensuing year," shall be made. This estimate contains the several items of ordinary current expenses of the county, such as repairs of public buildings, jurors' fees, jail expenses, keeping convicts in the penitentiary, &c., and upon it the tax is levied. It would perhaps not be a strained construction to hold that the several sums, thus designated, are, in effect, set apart—appropriated to the particular objects named, and that they should not be di-

<sup>1</sup> *Infra*, 352.

verted to objects not embraced in the estimates. Any other construction would render any appropriation except by actual payment from the treasury impossible. In other words, it would render any appropriation of the moneys of the county impossible.

We leave this question, however, as one worthy of consideration when it properly arises. For the reasons, before given, viz: the nature of the debt, and positive directions of the act as to its payment, and the exemption from seizure, on grounds of public policy, of money required for current expenses of the county, we are all of opinion that the writ should be awarded.

And now, September 23, 1862, this cause having been argued by counsel, and duly considered, the rule is made absolute, and an alternate mandamus awarded, returnable the 1st Monday of October next.

Dobbin v. Allegheny County, *supra*, 120; Pollock v. Lawrence County, *supra*, 137; Larimer v. Pitt Township, *infra*, 352; Evans v. Pittsburgh, *infra*, 405; Loute v. Allegheny County, *infra*, 411; Commonwealth ex rel. Mitchell v. Commissioners, *infra*, 417; Commonwealth ex rel. v. Floyd, *infra*, 422.

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*In the Court of Common Pleas of Allegheny County.*

IN RE PETITION OF CLEVELAND AND PITTSBURGH RAILROAD  
COMPANY, FOR VIEWERS, &C.

(Vol. X., p. 74. 1862.)

1. By the Act of Assembly of April 18th, 1853, Pamph. L. 473, and its supplement of April 11th, 1862, Pamph. L. 436, authority is given to the Cleveland and Pittsburgh Railroad Company to build a railroad from Rochester to Pittsburgh.
2. Though the language of the 11th section of the Act of Assembly of 19th February, 1849, regulating railroad companies, is mandatory that the court shall appoint a view, it means that they shall appoint a view only when the petitioner brings his case within the act.
3. The legislature has no power to authorize one railroad company to appropriate any premises of another railroad company which are necessary to the proper conduct of the business of the latter.
4. If a railroad company own lands or rights of way not necessary for the proper conduct of its business, such property may be taken for the use of another company, just as the property of any one on the line of the proposed road.

*J. W. F. White, W. S. C. Otis and A. W. Loomis*, for petitioners.

*J. H. Hampton, Hamilton & Acheson and C. Shaler*, for respondents.

The opinion of the court was delivered, Sept. 23d, 1862, by

RITCHIE, A. J.—The petition in this case sets forth that the petitioners have located, marked, &c., a route for a railroad, in pursuance of the act of incorporation, and of the laws of Pennsylvania, from the line between Beaver and Allegheny counties, to the property of J. & H. Phillips, near Manchester, in Allegheny county; that “said route is located partly on lands the fee simple of which is in the Pittsburgh, Fort Wayne and Chicago Railroad Company, and in other places partly on lands which the said Pittsburgh, Fort Wayne and Chicago Railroad Company alleges are embraced in their rights of way; but that the lands thus owned or claimed by the said Pittsburgh, Fort Wayne and Chicago Railroad Company, over which the route of the petitioners’ road is located, is not necessary for the uses and purposes of said Pittsburgh, Fort Wayne and Chicago Railroad Company.

The petition states also that petitioners have not been able to agree with the Pittsburgh, Fort Wayne and Chicago Railroad Company, as to the compensation for damages, &c., and asks the court to appoint viewers to estimate the damages, &c., under the provisions of the 11th section of the Act of Assembly of 19th February, 1849, regulating railroad companies, Pamph. L. 84.

On part of the Pittsburgh, Fort Wayne and Chicago Railway Company it is alleged that all the lands and rights of way owned by them “are necessary for the uses and purposes, present and prospective, of their road.” The Pittsburgh, Fort Wayne and Chicago Railway Company also deny that the petitioners have any authority by virtue of their charter and the laws of Pennsylvania to construct a railroad over and upon the premises and property described in their petition. The Pittsburgh, Fort Wayne and Chicago Railway Company further allege that prior to the 19th day of April, 1853, they had constructed and were



using, under and in pursuance of their charter and the laws of Pennsylvania, a railroad over and along property which had been appropriated under its charter, part of which the said petitioners now attempt to take and appropriate for the route of their contemplated railroad."

The charter of the Pittsburgh, Fort Wayne and Chicago Railroad Company authorizes the company to construct and maintain a railroad, with a single or double track, with such side tracks, turnouts, offices, and depots, as they may deem necessary. As a preliminary matter, it was alleged on the argument of this case that the petitioners have no corporate authority from Pennsylvania to build a road from Rochester, in Beaver county, to Pittsburgh. The court is of opinion that the Act of 18th of April, 1853, Pamph. L. 473, to incorporate the Cleveland and Pittsburgh Railroad Company, and the act supplementary to said act, of 11th of April, 1862, Pamph. L. 436, do give authority to petitioners to build a railroad from Rochester to Pittsburgh.

The petitioners allege that under the words of the 11th section of the Act of 19th February, 1849, regulating railroad companies, the court has no discretion, but must proceed to appoint viewers as prayed for. The Supreme Court of Pennsylvania, in a case similar in principle to this one, *Hays v. Risher*, 8 Casey 174, says the better practice is to arrest the proceedings *in limine* if, on the face of the application, fatal objections are revealed. The language of the act is mandatory that the court shall appoint a view; but this means that they shall appoint a view only when the petitioner brings his case within the act. So here, as the application of the petitioners discloses an intention to take property belonging to the Pittsburgh, Fort Wayne and Chicago Railroad Company, which that company alleges to be necessary for the proper conduct of its business; the court will exercise its discretion on the subject, and prevent anything from being done which it would afterwards feel itself bound to undo. No actual appropriation of the said property by petitioners will be permitted, until their right to appropriate is first established.

With regard to this subject, the court is of the opinion that the legislature has no power to authorize another railroad com-

pany to appropriate any premises of the Pittsburgh, Fort Wayne and Chicago Railway Company, which are necessary to the proper conduct of its business. The rights conferred upon it cannot be taken away and given to another railroad company, even by express words, much less by mere implication from authority given to another company to build a road between certain termini. The right of eminent domain can only be exercised where the property taken is converted from a lower to a higher use. For the discharge of the same use, the state has no right to transfer property from one person or body corporate to another.

“The right of eminent domain, or inherent sovereign power, gives to the legislature the control of private property for public uses only.” “It undoubtedly must rest, as a general rule, in the wisdom of the legislature, to determine when public uses require the assumption of private property; but if they should take it for a purpose not of a public nature, as if the legislature should take the property of A. and give it to B., or if they should vacate a grant of property or of a franchise, under pretext of some public use or service, such cases would be gross abuses of their discretion, and fraudulent attacks on private right, and the law would be clearly unconstitutional and void:” 2 Kent Com. 339, 340.

In the case of *Boston Water Power Company v. Boston and Worcester Railroad Corporation*, cited by petitioners, the Supreme Court of Massachusetts, 23 Pick. 393, says: “If it is suggested, that, under this claim of power, the legislature might authorize a new turnpike, canal or railroad, on the same line with a former one, to its whole extent, we think the proper answer is, that such a measure would be substantially and in fact, under whatever color or pretence, taking the franchise from one company and giving it to another, in derogation of the first grant, not warranted by the right of eminent domain, and incompatible with the nature of legislative power. In that case the object would be to provide for the public the same public easement, which is already provided for, and secured to the public, by the prior grant, and for which there could be no public exigency. Such a case, therefore, cannot be presumed.”

To take away property necessary for the proper conduct of its business, from a railroad company which is in full discharge of the duties for which it was organized, and give it to another railroad company, would be to take away from A. and give to B., and would moreover be a flagrant breach of good faith towards the first company.

If, however, the Pittsburgh, Fort Wayne and Chicago Railroad Company own lands or rights of way not necessary for the proper conduct of its business, we are of opinion that such property may be taken for the use of the Cleveland and Pittsburgh Railroad Company, just as the property of any one on the line of the proposed road.

From the information now in its possession, the court cannot decide that the premises of the Pittsburgh, Fort Wayne and Chicago Railroad Company, which the petitioners desire to appropriate to themselves, are not necessary to the proper conduct of the business of that company. We have concluded, however, to reserve this question for future consideration, and appoint viewers. In the meantime we will, if desired, appoint a commissioner to take testimony on the question of interference, to be considered in connection with the report of viewers. In the meantime the petitioners will not be permitted to enter upon the land in controversy, except for the purpose of making surveys and assessing damages.

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*In the District Court of Allegheny County.*

LARIMER v. PITT TOWNSHIP.

(Vol. X., p. 75. 1862.)

1. It is the first duty of township supervisors and auditors to keep the highways in good repair and to administer to the wants of the needy poor.
2. If the township be indebted they should levy an amount of tax, as far as allowed by law, sufficient to enable them to perform their duty and to discharge their indebtedness.
3. Where they have levied the tax up to the legal limit the residue only after

appropriation of the necessary amount for the roads and the poor, is applicable to payment of other indebtedness.

4. Executions against the township are liens on this surplus fund, if there be any, in the order in which they are issued against the present officers; an execution or order against the former officers has no priority. One having such order should keep it in force by an *alias* order to the incoming officers.

*McCandless*, for plaintiff.

*Woods*, for defendant.

The opinion of the court was delivered October 5, 1850, by

HEPBURN, J.—This is a rule to show cause why an attachment should not issue against the auditors and supervisors of this township, for alleged disobedience to the order of the court, to pay to the plaintiff, the amount of his judgment, recovered against them.

The order referred to appears to have been made on the 30th April last, in pursuance of the 6th and 7th sections of the Act of 15th April, 1834, "commanding the said supervisors and auditors of said township, to cause the amount of said judgment, with interests and costs, to be paid to the said William Larimer, Jr., out of any moneys unappropriated of said township, or if there were no such moneys, out of the first moneys that should be received for the use of said township." The plaintiff complains that this order has not been complied with, and prays that it may be enforced by attachment.

The requirement of the 6th section of the act in question, is, that a judgment obtained against a township, shall be paid out of any moneys unappropriated of such township; or if there be no such moneys, then out of the first moneys that shall be received for the use of the township.

The order of the court is in exact accordance with this section of the act, and the question is, have the supervisors and auditors neglected or refused to comply with the order? If they have, the attachment must issue; if not, the rule must be discharged.

The defendants deny that they have disobeyed the order of the court, and allege

1. That there has been no money in the township treasury since the service of the order, applicable to said judgment.

2. That the moneys collected are applicable in the first place to the necessary repair of the roads, and the maintenance of the poor, and the surplus alone is applicable to payment of judgments.

3. That there are orders prior in time to that of the plaintiff which are entitled to priority of payment.

It might be sufficient to say, perhaps, that the matters of fact alleged in these answers, and sworn to, not having been controverted, we need go no further, but discharge the rule; yet as the plaintiff appears to think the defendants liable, from the mere fact that the money has not been paid after the order served, it may be well to examine the questions suggested by the answer.

The Act of 21st April, 1846, Pamph. L. 468, authorizes the supervisor and auditors of said township to levy an annual tax not exceeding seven mills in the dollar of the county assessment, for the use of the supervisor and overseers of the poor, and directs the mode of payment, &c.

This act, together with the general enactments in regard to roads and highways and the support of the poor, makes it the duty of these officers to keep the highways in good repair, and to administer to the wants of the needy poor. And these I take to be their first duties. When the township is indebted, it is doubtless the duty of these officers to levy the highest amount of tax allowed by law, in order to discharge their indebtedness, and to enable them to perform their duties. This has been done in this township for several years past; the tax of seven mills, the extent of their authority, has been regularly levied for some years past, and no doubt properly applied; yet the township is largely indebted. Why this small limit, and whether the township will ever be relieved, I know not; but this is the limit fixed by law in this township, though under the general law the supervisor and overseer may levy the sum of one cent on the dollar of the county assessment.

The law making it the duty of the supervisors and auditors to repair the roads and support the poor, it is as much a legal obligation upon them so to do as to pay the debts of the township, and the only remedy is to perform both to the full extent of their means. They have this year levied a tax of \$2500, one-half of which may be required for the uses of the roads and the

poor. The residue will be applicable to the debts, and must be so applied. If the supervisor and auditors were extravagant in their expenditures, or expended the tax in repairs not absolutely necessary, or in any way exhibited a disposition to evade the payment of their debts, or to neglect obedience to the order of the court, the plaintiff would be entitled to his attachment. But no such case has been shown; they have done but their duty, and the appropriations they have made for repairs have not been shown to be unnecessary; and, therefore, there is no ground for the attachment.

The treasurer and overseer of the poor, it is true, in his answer, states that he has paid a small debt due by the last overseer. Whether this was paid since the order was received, I know not; the amount is so unimportant that it is scarcely worth inquiring after. It is sufficient to say that judgments against the township, ordered by the court to be paid by the auditors, &c., in office, are entitled to priority, and any other appropriation of the funds, except those before referred to, would subject the parties to attachment.

As to the lien or priority claimed for those judgments, ordered by the court to be paid by former auditors, though it is not necessary to decide the point, yet I do not hesitate to say, they are not entitled to priority. The order comes (*sic*) at the expiration of the office of those on whom it was made. The order or execution has no lien and no priority as against the incoming officers.

The order can only be enforced by attachment, and certainly attachment will not lie against the present incumbents, for disobedience to an order made on their predecessors in office. The party having such order should keep it in force by an alias order to the incoming officers, and each judgment would then be entitled to payment in the order in which the order of the court was granted for that purpose, from those officers against whom the order issued, but not against their successors.

The rule is discharged.

See *Commonwealth ex rel. Penitentiary v. Floyd*, *supra*, 342; *Evans v. Pittsburgh*, *infra*, 405; *Loute v. Allegheny County*, *infra*, 411; *Commonwealth ex rel. Mitchel v. The Commissioners*, *infra*, 417; *Commonwealth ex rel. Coon v. Floyd*, *infra*, 422.

*In the District Court of Allegheny County.*

RUSSELL v. SCHENLEY.

(Vol. X., p. 83. 1862.)

1. A purchaser at sheriff's sale is bound only for the taxes assessed on the land after the title became vested in him.
2. The owner is personally liable for all assessments on seated lands, and this whether the tax be assessed in his name or in that of the tenant.
3. Where, by the terms of the lease, the tenants are bound to pay the taxes, and the same are assessed on them, they are to be regarded as the principal debtors, while the landlord is to be considered as a mere surety, entitled to all the rights and remedies of a surety against the principal debtors.
4. In such case, where the collector had in his power to have secured the taxes by complying with the request of a tenant, to distrain, on the premises, the goods of a sub-tenant owing rent, and neglected to do so, he must bear the consequence of his own negligence. For the loss occasioned thereby he cannot recover from the landlord.

THIS was an action of assumpsit by Caleb Russell, Collector of Taxes for the First Ward, Pittsburgh, against Edward W. H. Schenley and Mary E. Schenley his wife, to recover for arrears of taxes, assessed on certain lots on Duquesne street, for the years from 1854 to 1858 inclusive.

Mrs. Schenley had owned the premises, and on the 21st September, 1853, defendants conveyed same to the Allegheny Valley Railroad Co., reserving an annual ground-rent. For arrears of this rent, the lots were sold by the sheriff, and by his deed, acknowledged May 16, 1857, were conveyed back to Mrs. Schenley, the purchaser.

The railroad company had, in February, 1856, leased the premises, a portion to James Barnes and the residue to William C. Mackey, for five years from 1st April, 1856, the lessees covenanting, *inter alia*, to pay all taxes and assessments upon their respective premises during said term. To these tenants defendants, after the purchase at sheriff's sale, gave leases for the premises and the terms specified in the railroad company's leases and with like condition.

The other material facts are stated in the opinion of the court.

*Reed and Thompson*, for plaintiff.

*Dicken and Mellon*, for defendant.

Opinion of the court filed August 16, 1862, by

WILLIAMS, A. J.—It is clear that the plaintiff is not entitled to recover the taxes assessed on the land while it was owned by the Allegheny Valley Railroad Company. The title of the company was divested by sheriff's sale, and, by deed, acknowledged May 16th, 1857, conveyed to the defendant Mary E. Schenley. If the plaintiff is entitled to recover any of the taxes sued for, he is only entitled to recover those assessed after the title had thus become vested in Mrs. Schenley: *Gormley's Appeal*, 3 Casey 49.

It is true that the taxes were assessed in the name of the tenant, but, as is said in *Caldwell v. Moore*, 1 Jones 58, the owner "is personally liable for all assessments on seated lands, and this whether the tax be assessed in the name of the landlord or tenant." But by the terms of the lease the tenants were bound to pay the taxes, and, therefore, they are to be regarded as the principal debtors, while the defendant is to be considered as a mere surety, entitled to all the rights and remedies of a surety against the principal debtors. The plaintiff had it in his power, as the stated case shows, to have secured the taxes, assessed for the years 1857 and 1858, on the premises demised to Mackey, if he had complied with his request to distrain the property of a sub-tenant who owed rent, and had goods on the premises sufficient for the purpose. The plaintiff neglected to do this, and it is but just that he should bear the consequence of his own negligence, and that the loss occasioned thereby should fall on himself rather than on the defendant. The taxes were assessed in the name of the tenants, and it was the plaintiff's duty to endeavor, in the first instance, to collect them from the tenants who were primarily liable, before resorting to the defendant. It follows that the plaintiff is only entitled to recover the taxes assessed for the years 1857 and 1858, on the premises demised to the tenant Barnes, with interest thereon from the expiration of his warrants.

And now, to wit, August 16th, 1862, this cause came on to



be heard on the case stated by the parties, and was argued by counsel at the last April Term of this court, and thereupon, on consideration thereof, it is now adjudged and ordered that judgment be entered in favor of the plaintiff for the taxes assessed for the years 1857 and 1858, on the premises demised to Samuel Barnes, with interest thereon from the expiration of the warrants respectively issued therefor, viz: for the sum of twenty-seven dollars and two cents (\$27 02) to be levied of the goods and chattels, lands and tenements of defendant Mary E. Schenley.

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*In the United States District Court for the Western District of Pennsylvania. In Admiralty.*

UNITED STATES v. STEAMBOAT ISAAC HAMMETT.

(Vol. X., p. 97. 1862.)

1. Partnership accounts cannot be settled in a court of admiralty.
2. Nor in a case of forfeiture, can a claim for alleged balances due by a part owner or copartner, be entertained.
3. The sentence of confiscation, if rendered, rises superior to all liens and equities.
4. The rebellious states of the Union are public enemies, and no claim of a citizen or subject of an enemy's country can be received.
5. Every resident of a hostile place or country, is regarded in such court as a citizen or subject.
6. His property, when libelled at the suit of the government, is condemned, without his being heard, as that of an enemy.

THIS cause was argued by *Kirkpatrick* and *Mellon* for the claimants, and by *Carnahan*, United States District Attorney, for the government.

The particulars sufficiently appear in the opinion of the court, which was delivered, October, 1862, by

MCCANDLESS, J.—This is a libel upon information of the United States District Attorney, and a seizure by the Marshal, of the steamboat *Isaac Hammett*, three-sixteenths of which is the property of *Victor Wilson*, a citizen and inhabitant of the state

of Mississippi. The other interests in the boat are held by William Dunshee and others, citizens of Pennsylvania, who have intervened, and, in behalf of themselves and Wilson, have put in an answer, claiming the boat as partnership assets, and that Wilson is largely indebted, as well to creditors, as themselves. The firm is styled the "Mississippi Coal Company," with extensive works on the Monongahela river, and engaged in mining and shipping coal to Vicksburg in the state of Mississippi, and to towns and cities on the coast of Louisiana. Affidavits were also filed declaring the loyalty of Wilson, and it was urged that he could not visit Pennsylvania, or answer in person, owing to the hostilities existing between the two sections of the Union.

To this answer the counsel for the government demurred, which presents two questions for the consideration of the court.

1. As to the partnership claims. We cannot settle partnership accounts in a court of admiralty; that belongs to another forum; nor can we, in a case of forfeiture, entertain a claim for alleged balances due by a part owner or copartner. The sentence of confiscation, if rendered, rises superior to all liens and equities.

The other question raised by the demurrer is

2. Whether we can hear a part owner, who is a citizen and resident of a state in rebellion against the government.

This point has been decided by my Brother Cadwallader at Philadelphia, and the decision affirmed by Judge Grier, since the argument of this case.

The rebellious states of the Union are treated as public enemies, and it is held, that "no claim of any citizen or subject of an enemy's country can be received, and every resident of a hostile place or county, is regarded in such Court as a citizen or subject." His property "when libelled, at the suit of the captors or their government, is condemned, without his being heard, as that of an enemy."

Such being the law we must decree a confiscation of the vessel, to the extent of three-sixteenths owned by Victor Wilson. Fortunately for the parties there is a saving clause in the Act of Congress, conferring upon the Secretary of the Treasury, full power to relieve the party, when a proper case is presented for his action. The loyalty of Victor Wilson is established to the

satisfaction of this court, and we think the proceedings here call for the interposition of the secretary.

Decree of confiscation as to the three-sixteenths owned by Victor Wilson. The residue released.

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*In the Orphans' Court of Allegheny County.*

ANDREW HENDRICKSON'S ESTATE.

SARAH BLESSINGS' PETITION.

(Vol. X., p. 105. 1862.)

1. Where an administrator in accordance with the decree of the Orphans' Court makes distribution of the decedent's personal estate, the settlement thus made can only be disturbed by a bill of review within five years.
2. After that time an Act of Assembly passed ordering the court to review its decree of distribution, is an attempt to violate private rights judicially settled and to overrule the judicial power of the Commonwealth, and is therefore unconstitutional and void.

*Penney* for the administrator.

*Purviance* for the petitioner.

The facts are sufficiently stated in the opinion of the Court, delivered October, 1862, by

RITCHIE, A. J.—The facts in this case are set forth in the report of the auditor. So far as they are material to the decision of the court, they are as follows: Andrew Hendrickson died about 15th February, 1844, unmarried and without issue, leaving two sisters of the whole blood, and one half-sister, daughter of his mother. He died intestate and left personal estate for distribution. John H. Baughman was appointed administrator of the estate of decedent. On the 14th February, 1845, he filed his account, showing the amount in his hands for distribution. On the 16th August, 1845, the court appointed an auditor to distribute the said amount. The only party in interest represented before the auditor was Elizabeth Baughman, a sister

of the full blood. The auditor was of opinion that under the testimony before him, a legal presumption of the death of the other sister of the full blood arose, and he does not appear to have heard of the half sister. On 4th November, 1845, he filed his report awarding the whole amount for distribution to Elizabeth Baughman. This report was confirmed by the court and on 25th November, 1845, the administrator paid over the amount in his hands, as therein directed. Between eleven and twelve years afterwards, the parties in interest, who had not attended before the auditor, procured the passage of an Act of Assembly, dated the 22d day of April, 1857, (Pamphlet Laws 280) which enacts "That it shall be the duty of the Orphans' Court of Allegheny county, on the petition of any party in interest, to grant a review of the administration account, and auditor's report, and decree of distribution thereon, of John H. Baughman, administrator of Andrew Hendrickson, late of Versailles township, Allegheny county, deceased, with the same effect as if application had been made within five years next after such decree, &c." Under this act, an auditor was appointed and now makes report distributing part of the said estate to parties who did not appear before the former auditor, and who now act as witnesses for each other to prove their relationship to decedent. These new parties moreover made no application for a review of the report of the former auditor, within five years after it was confirmed, and they stand now solely upon the Act of Assembly of 22d April, 1857, as the means of enforcing their claims in this case.

Among other exceptions to the report of the last auditor, the distributee under the report of the first auditor alleges that the said Act of Assembly of 22d April, 1857, is in violation of the Constitution of Pennsylvania, and void.

By the proceedings in 1845, the rights of these parties were judicially ascertained and settled, and the settlement thus made could only be disturbed by a bill of review within five years, the period allowed by law to the most remiss or negligent, within which they might make good their claims. After five years had elapsed without the filing of any bill of review, the rights of all parties were as solemnly settled, and the interests of all parties

as perfectly vested, as it is possible for law, enforced by judicial action, to settle or vest anything. This Act of Assembly annuls the former law with regard to these parties, and orders this court to review its decree of distribution. It seems to the court that if the legislature have power to do what they have undertaken to do in this case, they may pass laws directing the courts to change or reverse any decision whatever. In that case, any one who has interest enough to get a private bill through the legislature, may disregard the laws and decisions of the courts, and at any length of time after business has been judicially settled, may have everything opened up again and arranged to suit his own purposes.

The "judicial power of this Commonwealth" is vested by the Constitution in the courts, and not in the legislature. The judicial power is as independent of the legislative as the legislative power is independent of the judicial. It appears to us that the legislature has, by the said Act of 22d April, 1857, attempted to violate private rights, judicially settled, and to override the judicial power of the Commonwealth. For these reasons we shall, unless otherwise instructed by the Supreme Court, refuse to obey its commands in this case.

The report of the auditor appointed under said Act of Assembly of 22d April, 1857, is set aside.

BY THE COURT.

STERRETT, P. J., having been of counsel in this case, took no part in the proceedings.

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*In the Oyer and Terminer of Greene County.*

COMMONWEALTH v. LEMLEY.

(Vol. X., p. 122. 1862.)

In Pennsylvania a prisoner charged with a capital offence, has a constitutional right, even after indictment found, to be admitted to bail where the evidence produced on the hearing satisfies the judge to whom the application is made that the offence is not capital.

THIS was an application for bail by a prisoner after the finding of a true bill of indictment for murder. Opinion by

LINDSAY, P. J.—The bill of indictment charges the prisoner with the crime of murder; the grand jury have found it a true bill; the trial has been continued upon the motion of the prisoner; and he now asks to enter bail for his appearance.

The district attorney opposes the application, on the simple ground, that bail cannot be taken, after the finding of the indictment for murder.

And, thus is raised the naked legal question, can a prisoner be admitted to bail after indictment found against him for a capital offence, where the evidence produced on the hearing, satisfies the judge, to whom the application is made, that the offence is not capital? Or, in other words, can the judges look beyond the indictment, into the testimony, to determine whether the prisoner is bailable?

It is conceded that the practice, in this judicial district, for some years past, has been to refuse all applications for bail after indictment found for murder, without further inquiry; but the counsel for the prisoner strenuously contends that this practice is erroneous; and, that in a case like this, it would deny to a prisoner what is his constitutional right.

At common law, bail is a matter of discretion with the judges. The Court of King's Bench had an unlimited power of admitting to bail for all offences, including treason and murder; but bail was not demandable as a right. Of course, the judicial discretion was exercised according to established rules. The object of the detention or imprisonment of the prisoner being to secure his forthcoming to abide the sentence of the law, the principal inquiry was, whether a recognisance would effect that end. In seeking an answer to this inquiry, the matters chiefly considered, were, the seriousness of the charge, the nature of the evidence, and the severity of the punishment. Hence, when the offence was capital, and the evidence in support of it was strong, bail was denied because no pecuniary consideration would be likely to secure the attendance of the prisoner, to the probable loss of his life. And the same rule prevailed in offences not capital, where the evidence

was clear, and the punishment was, by a long and rigorous imprisonment; and, for the same reason.

In murder and manslaughter, where the prisoner was notoriously guilty, by his own confession or otherwise, the almost unbroken practice was, to refuse bail. Where there were circumstances in his favor, or where the evidence against him left reasonable doubts of his guilt, bail was generally allowed: 2 Hawk., ch. 15, 580; 3 East 165; Ex parte Baronett et al., 16 Eng. Law Eq. Rep. 361 (decided in 1850). In England, of late years, bail has seldom been received in murder; and perhaps not at all, where the evidence produced upon the hearing, would justify a verdict of guilty, unless in case of extreme ill health, and danger to the prisoner's life from confinement.

But was the power of admitting to bail exercised after indictment found? The English practice, in this respect, has not been uniform. In Lord Mohun's Case it is ruled that after a coroner's inquest, charging a man with murder, he may be bailed, because the judges may look into the written depositions taken before the coroner; but it is otherwise if he be found guilty of murder by a grand jury, because the court cannot take notice of the evidence before them, which their oath binds them to keep secret. Perhaps the reason here assigned for refusing bail after indictment is not applicable to our practice. With us the indictment itself discloses the names of the witnesses examined by the grand jury, even if the district attorney did not know them, and they can be easily called before the judge upon the hearing, or their depositions can be read to him. In *Egerton v. Morgan*, 1 Bulst. 69, there was an appeal of murder as well as an indictment for murder; the court, after full consideration and examination of the precedents, bailed the prisoner. Lord Cardigan was indicted for shooting at Captain Tucket, with intent to murder him. After bill found, his recognisance was enlarged until the trial. And where the prisoner's life was supposed to be endangered by continued confinement, he was bailed after indictment found: Lord Aylesbury's Case, 1 Salk. 103. But, at the present day, bail is usually refused in England after the grand jury have returned a true bill for murder: 8 C. & P. 558; 9 Id. 228.

In those states of our Union where there are no constitutional provisions or statutory enactments upon this subject, the English practice has been pretty closely followed. The right to admit to bail in felonies of death has scarcely been questioned and has been repeatedly recognised. In most of these states bail is not usually taken in cases of murder; but it seems to be generally conceded that it may be done, and in some of them it has been done. This power to bail in all offences is regarded as an incident of the right and duty to hear and determine them.

Bail has frequently been taken after indictment found: 8 Barb. 664; 5 Randolph 664.

In Mississippi bail may be received in a proper case even after conviction: 6 Howard 402.

And here, as in England, the prisoner's ill health, when endangering his life, has been held as sufficient reason for admitting him to bail: 6 Grattan 705; 11 Leigh 605.

Thus far I have examined the subject chiefly in the light of the common law, by which bail in the higher felonies is not of course, but only of discretion. I now approach higher ground. In Pennsylvania bail is not a matter of discretion; it is an absolute right. It is a right guaranteed by the fundamental law of the state; and where, by that law, a prisoner is entitled to the right, no power exists anywhere to deprive him of the full benefit of it. It is not necessary to refer to the Act of 1705. The Constitution itself defines the right. The clause in the Constitution of 1798, copied into our present Declaration of Rights, provides that "all prisoners shall be bailable, by sufficient sureties, unless for capital offences where the proof is evident or the presumption great." What is a capital offence within the meaning of this clause? Plainly, an offence for which the death penalty is inflicted—a felony of death. Since the very able opinion of Judge King, in 2 Ash. 227, it is needless to argue that murder in the second degree is a bailable offence in this state.

Taking it for granted that such is the law, and that, before indictment found, there would be no question about the right to bail, I proceed to inquire how the right stands after indictment. If, under our Act of 1794, the grand jury had the power to determine between murder of the first and murder of the second



degree, and if they had accordingly found this offence to be murder in the second degree, I suppose there would be no doubt about the right to bail.

Granting the right to bail before indictment, because the offence seems not to be capital, it follows that after indictment found, limiting the trial to the inferior offence, the right would stand on still firmer ground. Hence the mere fact that the indictment is found, does not take away the right to bail. But, the argument is that the indictment is found for murder in the first degree, and that this is conclusive against bail. Waiving, for a moment, the question whether, even in such case, the finding of the indictment is conclusive, I wish to see what is, in truth, the return of the grand jury in this case. The indictment contains but one count; it follows the usual form and lays the crime so that it is probably of the first degree. So far all is plain. But in this state, the grand jury cannot determine the degree of murder, that is the province of the traverse jury which tries the cause.

The grand jury may find whether the offence is manslaughter or murder, but if they find that it is murder, they can go no further. Hence, although the grand jury may have been of the unanimous opinion that this offence was only murder in the second degree, yet they could not do otherwise than find the bill as it is now before us. In point of fact we cannot know whether the grand jury regarded this as murder in the first or in the second degree, and hence it ought not, in my judgment, to be conclusive against a great constitutional right. It is no answer to this reasoning to say that we must look to the language of the indictment for the return of the grand jury. In dealing with the constitutional rights of citizens, we must look at the truth and not at fictions—at substance and not at form. If, then, under our system of criminal law, the indictment is not conclusive as to the degree of murder, it follows that it is the duty of the court to look into the evidence upon the prisoner's application for bail, in order to determine the degree. This view, if correct, brings us to the end of the case.

But I desire to strengthen the conclusion by looking at this position of the district attorney as a general proposition.

Can it be true that where an indictment has been found for a

capital offence, the accused has no right to bail under any circumstances? I do not claim that our constitutional provision leaves untouched the discretion of the court to take bail in capital offences where the proof is evident or the presumption great. In some of the states which have a similar constitutional provision, it seems to be thought that the discretionary power remains even in such cases.

In my opinion, however, the discretionary power of admitting to bail is altogether taken away in Pennsylvania, and where the right to bail does not exist, the judges have no power to allow it.

But why should the finding of an indictment for a felony of death be conclusive against the right of bail in any case?

The constitution does not so provide; no positive law enacts it; reason does not approve it. Suppose after indictment found for a capital offence, circumstances render it perfectly apparent, that the prisoner is innocent: take a case which has actually occurred; the man supposed to be murdered, has only absconded and afterwards returns, in full life and stands before the judges as a witness upon the hearing, would it not be barbarous to keep the prisoner in jail until the trial, simply because an indictment has been found?

We have seen that where bail was only of discretion, it was sometimes received after indictment; and if the indictment did not take away the discretionary power, shall it be permitted to take away a constitutional right? It has been held in Ohio, that where the evidence was not strong enough to sustain a verdict of guilty, the prisoner had a right to bail even after indictment: 19 Ohio 139.

We agree that the practice of hearing evidence, on an application to bail, after indictment, is inconvenient and troublesome; but it is not more so, after indictment than before; and, besides, the inconvenience which may attend giving a prisoner his rights, is scarcely a legitimate argument to show that the right does not exist in the particular case. I agree also, that an indictment makes a *prima facie* case for the Commonwealth, but the inquiry before us, is whether it is conclusive. Recurring a moment to the clause in the Bill of Rights, we notice another point made in the argument—"all prisoners shall be bailable by sufficient

sureties, unless for capital offences, where the proof is evident, or the presumption great." Some difference of opinion has arisen respecting the proper construction of the last member of this sentence; and perhaps the thought is not very clearly expressed. It has been contended that it is necessary that "the proof" should be "evident or the presumption great" that the offence charged to have been perpetrated, is really a capital one; and hence that, if any doubt exists as to what will be the degree of the crime, as ultimately fixed by the verdict, the prisoner is entitled to be bailed. I cannot agree to this construction. I think the clause in question has reference to the guilt of the prisoner, rather than the degree of the offence, "where the proof is evident, or the presumption great" that the offence was committed by the prisoner. The degree of the offence is to be determined as a question of law; the guilt or innocence of the accused is a matter of fact, and there is much reason in requiring that "the proof shall be evident or the presumption great" of the fact of his guilt, before denying him the right of bail. This construction is in conformity with the English practice, which, as we have seen, was to refuse bail where the prisoner was notoriously guilty; and both the old practice and the constitutional provision seem to have an analogy to the wholesome rule that a reasonable doubt of the prisoner's guilt arising from the evidence, will entitle him to an acquittal upon his trial, I conclude, then, that this clause points to the fact of the commission of the offence, and not to the nature or degree of the offence itself.

And this leads me to adopt as the true rule, the one stated by Judge King in 2 Ashmead 277: that where the judge would sustain a verdict of murder in the first degree upon the evidence before him at the hearing, he should refuse bail.

In this case there is no doubt about the commission of the offence by the prisoner; he admits the slaying of the deceased, and claims to stand excused on the ground of self-defence. Nothing therefore remains but to determine the degree of the offence; and to apply to it the rule stated above.

In this part of the case, we refrain, for obvious reasons, from any comments upon the testimony. Suffice it to say that after

a careful examination of the evidence before us, we are of the opinion, upon that evidence, that the offence cannot be murder in the first degree. We think the prisoner has a right to bail.

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*In the United States District Court for the Western District  
of Pennsylvania.*

UNITED STATES v. GOUGHNOUR.

(Vol. X., p. 130. 1862.)

1. In an indictment for passing counterfeit coin, evidence of the possession of counterfeit bank notes is not admissible to prove the *scienter*.
2. But the possession of quantities of counterfeit coin, of a different denomination from that laid in the indictment, is admissible for such purposes.

THIS was a motion for a new trial, and was argued by Mr. Carnahan, United States District Attorney, for the Government, and by Messrs. *Kopelin, Noon, Hampton, and Swartzwelder*, for the defendant.

The opinion of the court was delivered by  
McCANDLESS, Dist. J.—Satisfied with the verdict in this case, I do not feel disposed to disturb it, except upon substantial grounds. There is one point to which I have given much reflection, because it will be a precedent, and if wrong, “many errors, by the same example will creep” into this court. It is the admission in evidence of the fact, that counterfeit bank notes were found in possession of the prisoner, to prove the *scienter*; that is, that he knew the dimes which he passed were counterfeit. The evidence was admitted, upon the authority of the text in Greenleaf, but the cases cited by the learned author do not sustain the position contended for by the Government. As Lord Campbell says, in 4 Eng. Law & Eq. Rep. 572, “it was evidence which went to show that the prisoner was a very bad man, and a likely person to commit such offences as that charged in the indictment; but, with regard to the *scienter*, it did not afford ground for a legitimate inference in respect of it. The possession of

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counterfeit bank bills, does not necessarily show guilty knowledge of counterfeit coin. If the indictment was in the state court and under the state laws, for passing counterfeit bank bills, the possession of other bank bills of a similar character would tend to prove the *scienter*. And so of coin. On an indictment in this court for passing counterfeit coin, the possession of other counterfeit coin, although of a different denomination, would go far to show guilty knowledge. Coin is money. Bank bills are the mere representatives of money, and a knowledge of the false character of the one, does not imply a knowledge of the false character of the other. Holding the latter in common with the former, may be suggestive of the occupation and purpose of the party; but counterfeiting the coin, being a usurpation of one of the highest acts of sovereignty, and the "passing" being highly penal, no qualified evidence should be given to prove the guilty knowledge.

Although the court charged the jury that the proof upon this point was of little value, yet they may have been influenced by it, and the prisoner is entitled to the benefit of the reason assigned.

As to the other reasons, in the language of Chief Justice Gibson, in the case of *Rogers v. Walker*, 6 Barr 375, "they form a reticulated web to catch the crumbs of the cause, and as they contain no point or principle of particular importance which has not already been ruled by this court, they are dismissed without further remark." New trial granted.

The United States *v.* Roudenback, 1 Bald. 514; The United States *v.* Doeblor, Id. 519.

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*In the United States Circuit Court for the Western District of Pennsylvania.*

UNITED STATES EX REL. TURNER *v.* WRIGHT.

(Vol. X., p. 154. 1862.)

1. Act of Congress of 13th February, 1862, construed.
2. The oath of enlistment, where the person enlisted is under eighteen, is not

conclusive upon the courts, but is upon the recruiting officer, for whose protection the proviso was inserted in the act.

3. The Act of 1802 declares that no person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent of his parent or guardian or master, first had and obtained, if any he have.
4. The Act of 20th January, 1813, provided that this consent should be first obtained in writing.
5. And the Act of 10th December, 1814, repealed this section of the Act of 1813, but left intact the Act of 1802, which requires the previous consent, but does not require that it should be in writing.
6. A contract of enlistment with a minor, being prohibited by the statute, is not merely voidable, but absolutely void.
7. It does not alter the case that he perpetrated a fraud upon the officer enlisting him; for otherwise it would take away the very protection which the law intends to throw around him, to guard him from the effects of his folly, rashness and misconduct.
8. The return to the writ of *habeas corpus* does not make the minor a deserter. There can be no criminal desertion if the enlistment was illegal.
9. The desertion was a declaration merely of an intention not to be bound—a disclaimer of the contract; which, under the Act of Congress, he had a right to make, in the absence of the consent of his parent or guardian.
10. In the presence of an enemy, or in an enemy's country, the minor, and even camp followers, would be amenable to martial law; for, if they were not, the safety of the army might be somewhat jeopardized by their desertion to the enemy.
11. It could only be in that light that a person unlawfully enlisted, and held without authority of law, would be amenable to military punishment.

THE case was argued for the United States by U. S. District Attorney *Carnahan*, and for relator, by *James H. Hopkins, Esq.*

The facts may be gathered from the opinion of the court, which was delivered by

MCCANDLESS, Dist. J.—Considering the reprehensible conduct of this young man, Theodore Turner, whose discharge is asked for, I do not feel disposed to grant it, unless required by the rules of law.

He is neither an idiot nor a lunatic, but seems gifted with more than ordinary intelligence; and yet, to obtain the compensation as a substitute for a drafted soldier, he imposed not only upon him, but upon the military officers of the United States. Although but nineteen years of age, he represented himself as one month over twenty-one, and received the sum agreed to be

paid. He may have designed to act in good faith until maternal and family ties were interposed, but this cannot palliate the utterance of a falsehood, to which he added the semblance of truth by giving to it the solemnity of a written declaration, almost, but not quite, sanctioned by an oath.

This allegation, fortunately for him, in the printed affidavit, is mere matter of description, and is no part of the oath of enlistment; and Captain Ludington, the United States mustering officer, testifies that he did not swear him as to his age.

The mother, the surviving parent, asks his discharge upon the ground of minority; and the proof before the court is clear that he was but nineteen years of age on the 2d day of October last.

The first objection raised by the United States attorney is that by the Act of the 13th of February, 1862, the oath of enlistment taken by the recruit shall be conclusive as to his age. Conclusive upon whom? Upon the mustering officer, who is prohibited by the proviso of the section from mustering into the United States service any one under the age of eighteen. The act was passed to relieve the Secretary of War from the herculean labor of passing upon the thousands of applications for the release of persons who had been mustered into the service without the consent of their parents or guardians; and while admonishing the mustering officer not to receive any under the age of eighteen, yet if he did so, the oath of enlistment taken by the recruit should be his protection. Because, by the Act of 1802, to which we shall presently refer, the recruiting officer was subject to a penalty for enlisting a minor without the consent of his parents or guardian, which was to be deducted from that officer's pay and emoluments. Congress never intended that the oath, however false, should be binding on the courts, or give validity to a contract which an un repealed statute declared to be illegal. Aside from this, there was no oath administered here.

This, then, is a contract made by a minor. Let us see whether it is sanctioned or prohibited by the Acts of Congress.

The Act of 1802 declares that no person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States without the consent of his parent, or guardian or master, first had and obtained, if any he had. The

Act of 20th January, 1813, provided that this consent should be first obtained in writing. And the Act of the 10th December, 1814, repealed this section of the Act of 1813, but left intact the Act of 1802, which requires the previous consent, but does not require that it should be in writing.

It therefore appears in plain Saxon that the contract of enlistment with a minor, being prohibited by the statute, is not merely voidable, but absolutely void.

This question is not so novel as I thought when I commenced its investigation. It was, in some of its features, discussed before Mr. Justice Coulter, not only an able and learned judge, but a statesman of national reputation, whose long and brilliant career in the House of Representatives made him familiar with the acts of the National Legislature.

In the case of *The Commonwealth v. Fox*, 7 Barr 338, he says: "The enlistment and holding of the minor, under the circumstances mentioned in the act, is against the law, and the officer who enlisted him is guilty of an offence for which he may be amerced by his government. A penalty inflicted by statute for an act, implies a prohibition of the act, so as to make a contract relating to it void: *Mitchell v. Smith*, 1 Binn. 118. Here there is not only a penalty imposed, but the act is declared by the statute to be illegal. I will not say that Congress may not declare the enlistment of minors to be lawful and valid, but they have not done so in relation to the army of the United States." But until Congress interposes, we must take the law as we find it, and regard the claim which the law of God, of nature, of the state, and of the United States, gives the father to the services of his child until he arrives at the age of majority, and which renders the minor unable to make a valid contract.

It is further contended that as he perpetrated a fraud, not only on the government but the drafted soldier, he is bound. But Mr. Justice Story says, in 10 Peters 77, this has never been held sufficient, for it would otherwise take away the very protection which the law intends to throw round him, to guard him from the effects of his folly, rashness and misconduct.

Lastly, it is objected that he is a deserter, and subject to military law. The return to this writ does not make him a



deserter. There can be no criminal desertion if the enlistment was illegal. It was a declaration, merely, of an intention not to be bound—a disclaimer of the contract, which, under the Act of Congress he had a right to make, in the absence of the consent of his parent or guardian. In the case of Carleton, 7 Cowen 471, although the minor had represented to the officer enlisting him that he was over twenty-one years of age, and had no father or guardian, the court declared the contract and enlistment void, and discharged the soldier. And in the case in Barr, referred to, Judge Coulter says: "In the presence of an enemy, or in an enemy's country, even camp followers would probably be amenable to martial law; for if they were not, the safety of the army might be somewhat jeopardized by their desertion to the enemy." It could only be in that light that a person unlawfully enlisted, and held without authority of law, could be amenable to military punishment. But this is not a case of that kind. And, although in that case the return showed that the minor was a deserter, and that like Turner here, had surrendered himself, the minor was discharged. However much we should like to see this young man expiate his offence by some reasonable punishment, the law of the case is clearly with him, and he is entitled to his discharge.

Theodore M. Turner is discharged from the custody of the Provost Marshal, upon payment to the United States Marshal, for the use of David Klingsmith, the sum of one hundred and seventy-five dollars and the costs of this writ.

In re Sardle, 3 American 85; Gaigallon's Case, *infra*, 376; Markley's Case, *infra*, 380; Wendts' Case, *infra*, 402; Henderson's Case, *infra*, 440.

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*In the United States Circuit Court for the Western District of Pennsylvania.*

RODDY AND WEYAND v. THE UNITED STATES.

(Vol. X., p. 161. 1862.)

1. Where a postmaster has made default in not paying the quarterly balances found to be due to the United States by the auditor for the Post-Office

Department, and the Postmaster-General has failed to institute suit against such postmaster and his sureties for two years from and after such default, the sureties are discharged.

2. Proviso to 3d section of the Act of Congress of the 3d March, 1825, construed.

ERROR to the United States District Court.

On the 5th day of June, 1861, suit was brought against John D. Roddy and D. Weyand, sureties upon the official bond of H. C. Marks, late postmaster at Somerset, Pennsylvania.

Bonds in six hundred dollars, dated the 17th day of June, 1853, conditioned that the said Harvey C. Marks shall well and truly execute the duties of postmaster according to law.

The declaration sets forth generally, that said Harvey C. Marks did not faithfully, once in three months, as he was required, render accounts of receipts and expenditures, in the manner and form prescribed by the Postmaster-General, and hath not paid the balance of all moneys that came to his hands for postage.

The defendants plead that Harvey C. Marks, having been a defaulter for more than two years previous to the time of suit brought against them, his sureties, that under the proviso contained in the third section of the Act of 3d March, 1825, they were no longer liable. It reads as follows:

Provided, That if default be made by the postmaster aforesaid at any time, and the Postmaster-General shall fail to institute suit against such postmaster and said sureties for two years, from and after such default shall be made, then and in that case, the said sureties shall not be held liable to the United States, nor shall suit be instituted against them.

The account of the Post-office Department, filed in the case, and the only evidence produced at the trial, shows that the first default was made for quarter ending 31st of March, 1856, and that default was made every succeeding quarter from that time down to 30th of June, 1860, the postmaster not having in all that interval furnished a single quarterly account. The account of the department shows his indebtedness, because of these defaults, to be, on the 30th of June, 1857, \$2158 46. The 30th of June, 1859, was claimed the latest day to which the liability of the sureties extended.

The court below refused to sustain the plea of defendants, and instructed the jury, "That the limitation contained in the proviso to the third section of the Act of 3d March, 1825, is a bar only to the recovery of the several balances accruing more than two years before the institution of the suit. For the sums which accrue within two years, the plaintiff is entitled to recover, not exceeding the penalty of the bond." To this instruction the defendants below excepted, and a bill of exceptions was sealed. A verdict and judgment was rendered in favor of the plaintiff below for six hundred dollars, the amount of the penalty of the bond.

*Howard* and *Roddy*, for plaintiffs in error, contended, that the case was within the spirit and meaning, and also within the letter of the proviso to the third section of the Act of 3d March, 1825.

*Carnahan*, United States District Attorney, for defendant in error, argued, that the true construction of the proviso was to limit the recovery to balances accruing within two years.

The opinion of the court was delivered by

GRIER, J.—I think this case comes not only within the letter, but within the spirit, of the proviso to the third section of the Act of March 3d, 1825. If default be made "at any time," and suit be not brought in two years, the sureties "shall not be liable to the United States, nor shall suit be instituted against them."

In this case, the postmaster first made default on the 30th of June, 1857. He was permitted to remain in office three years, without rendering an account or paying the balance of \$2158 46 then due.

Here was a case of gross negligence on the part of the officers of the general post-office, against which it is the obvious policy of the statute to protect the sureties.

The case of *Jones v. The U. S.*, 7 Howard 681, turned chiefly on the appropriation of payments. A running account had been kept and the balance due, on the last quarter, was within the two years, so that the question now before us did not arise, and

was not decided. In the case of the Postmaster-General v. Fermel, 1 McLean 217, Mr. Justice McLean has given the construction to this section of the act which it seems it fairly demands. He observes that the statute was adopted for the benefit of sureties, and to excite the utmost degree of vigilance in the department. The reason urged, why Statutes of Limitation should not run against the government, is founded upon a theory that it cannot be guilty of laches, and would be apt to suffer if the neglect of its servants to prosecute its claims should be permitted to release a surety. But this is an enactment for the purpose of protecting innocent sureties against the results of official laches. When a deputy postmaster becomes a large defaulter, and is afterwards permitted for three years to continue in office without rendering an account, or paying the balance previously due, it would be unjust to the sureties to make them victims of such conduct in the officers of government. It is the very evil from which the statute was intended to protect the surety. A failure to institute suit in due season discharges the sureties from all liability on their bond, and prohibits a suit thereon, after that time.

The judgment is reversed and a *venire de novo* ordered, if requested by the plaintiffs below.

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*In the Common Pleas of Dauphin County.*

THE COMMONWEALTH EX REL. GALGALLON v. ROGERS.

(Vol. X., p. 178. 1862.)

1. Under the Acts of Assembly, persons between the ages of eighteen and twenty-one years may claim exemption from military draft, but like all other personal privileges it must be pleaded or claimed at the proper time and before the proper tribunal, and if not so done it is waived.
2. If a person not liable to militia duty be enrolled as a militiaman and does not claim exemption of the commissioner of this district, but suffers himself to be mustered into service and remains there for one month before instituting proceedings for his release, his neglect is evidence of a voluntary submission to the draft.

THE following opinion was delivered November, 1862, by

PEARSON, P. J.—In answer to the above writ, the officer returns that he holds Michael Galgallon as a regularly drafted militiaman, sworn and mustered into the service of the United States, in Company H, 177th Regiment, Pennsylvania troops. In order to controvert the truth of the return, the complainant has proved that he is under twenty-one years of age, and consequently exempt from serving in the militia. He has also adduced some slight evidence of a difficulty in claiming the exemption at the time fixed for hearing such cases, by the commissioner appointed by the governor to act on that subject, and superintend the draft. We have already decided, in *Markley's Case* (*infra*, 380), from Lancaster county, that a judge has no power, on a writ of habeas corpus, to determine that a draft is irregular. To enable the judiciary to discharge from the service, the proceeding must be void. If a person entitled by law to exemption is refused it by the commissioner, the courts at law cannot review his decision. There is no connection whatever between his action and that of the judiciary. No appeal lies, and we cannot review what he decides by writ of error or certiorari. When the officer transcends his jurisdiction the act is void, not binding on the citizen, and the judiciary is bound to relieve him from illegal restraint. Army Order No. 99, which has all the force of an Act of Congress, directs the enrolment of all able-bodied citizens between the ages of eighteen and forty-five. The rolls are to be deposited in the sheriff's office of the proper county, and notice is to be given to the commissioner that they are so filed. The commissioner then gives notice of the time and place where claims for exemption will be heard and determined by him, and after he has decided all such claims, and stricken the names of those exempted from the list, the drawing takes place. All are to be exempted who are enumerated in the order, and also such as are entitled by the state laws. Under our Acts of Assembly those between the ages of eighteen and twenty-one can claim exemption, but like all other personal privileges it must be pleaded or claimed at the proper time and before the proper tribunal, and if not so done it is waived. Ministers of the gospel, professors of colleges and school directors are exempted, as are also those be-

tween the ages indicated; and should any such persons fail to present their claim and have it passed on by the commissioner, or if decided against them by him, they would be obliged to serve if drafted. Being between the ages of eighteen and forty-five, they are, by the law of Congress, subject to enrolment; therefore the commissioner has jurisdiction in their case. Should men above or below the legal age be enrolled, they need give the subject no consideration, as there is no jurisdiction over their persons, and the act is void, no neglect on their part can make it good.

The relator in the present case either had or had not an opportunity of presenting his claim for exemption. If he had not (as averred), it is his misfortune, yet it cannot be relieved against by the judiciary. If he had, and neglected to make the claim, it is his fault, and he cannot now be heard by me. Some evidence has been produced to show the want of opportunity for a hearing before the commissioner prior to the drafting, but the alleged hardship is illusory, as the state authorities, with just liberality, admitted such excuses down to the time of being sworn into service.

The relator was in camp at this place over two weeks before being mustered in, and during all of that time never claimed exemption, nor made known the fact that he was under age; nor did he suggest it at the time of being sworn or since, until within a few days, although he has been in camp about one month in all. It is said, however, that the relator is not subject to military duty by the state laws, and therefore could not be drafted. The Act of Congress is paramount, and can fix a different age for service entirely, and has done so in the present case. It is, therefore, by virtue of the clause exempting all of those relieved from service by the laws of the respective states that the relator can be excused, and to avail himself of that he must claim the exemption.

Michael Galgallon is remanded to the custody of his officers to perform military duty.

See Turner's Case, *supra*, 370; Markley's Case, *infra*, 380; Wendt's Case, *infra*, 402; Henderson's Case, *infra*, 440.

*In the Common Pleas of Dauphin County.*

## THE COMMONWEALTH EX REL. MARKLEY v. BIERER.

(Vol. X., p. 185. 1862.)

1. The Act of Congress and Army Order which directs the commissioner to cause "to be drawn from the wheel a number of ballots equal to the number of drafted men fixed by the governor to be drawn as the proper quota" does not authorize the commissioner to take additional names from the wheel, to make up for any that may be rejected by the mustering officer.
2. His power ceases the moment he has drawn the *pro rata* number required of such district, and all names taken out afterwards cannot be treated as a drawing under the law, but in express violation of its provisions, and any one so drawn stands in the situation of a person forced into the service without being drafted.
3. Where the draft is void, it requires some new contract of service voluntarily entered into to make it binding.
4. A proceeding defective for irregularity, and one void for illegality, may be reversed upon error or certiorari, but it is the latter defect only which gives power to discharge on *habeas corpus*.

PEARSON, P. J.—The complainant, John Markley, sued out a writ of *habeas corpus*, directed to Col. Everard Bierer, the commandant at Camp Curtin, averring that he is illegally restrained of his liberty; to which the respondent replied that he held him as a militia soldier, and sworn into the service of the United States. Evidence has been adduced to show that the draft was illegally conducted, and the complainant not bound to serve, and the following facts have been established: After the enrolment of Lancaster county was completed and placed in the hands of the commissioner appointed agreeably to law, and the number of men ascertained which was to be furnished by each township, borough and ward, it appeared that the quota for the county was one thousand six hundred and seventy-seven, and that for Hempfield township, in which the complainant resided, was forty-nine. Regular notice was given of the time and place for hearing excuses and claims for exemption, and all who came forward were heard. The commissioner, at the time and place, and in the manner prescribed by law, proceeded to draw for a few townships, and after drawing the number required, continued to take some

additional names from the wheel to make up for any that might be rejected by the mustering officer on account of physical disability. About this time he received orders from the department at Harrisburg to allow any valid excuses which should be made after the draft, the same as if they had been presented before, and an additional list of those entitled to exemption was furnished him. Believing that the number to be excused under these new orders would be considerable, the commissioner greatly increased his over draft in all his subsequent drawings, and on coming to Hempfield township, proceeded to draw one hundred and ten names from the wheel instead of the forty-nine required. Markley was not one of the forty-nine first drawn, but was in the over draft. Of the forty-nine first drawn, six were excused on account of being conscientiously scrupulous about bearing arms, one as being under age, three for physical disability, and one a justice of the peace. None of these had appeared before the commissioner until drafted, with the exception of the justice, whose claim was disallowed by the commissioner, but was afterwards allowed by an order from the department.

The over draft for the whole county of Lancaster was nine hundred and twenty-five, and that for Hempfield township sixty-one. The name of John Markley was drawn the sixty-third; but owing to the exemptions allowed, subsequent to the appeal, it required to and including the sixty-fourth name drawn, to make the number ordered to be furnished.

The Act of Congress of 1862, authorized the President of the United States to prescribe a system for drawing such portion of the militia as he should deem necessary, to take effect in those states whose laws were imperfect, or where none existed, under which a draft could be made; and by virtue of this delegated power, Army Order, No. 99, was devised and adopted, and to it we must look for the whole system of enrolling and drawing the militia in Pennsylvania, as we had no law under which it could have been effected.

The governor is directed to appoint officers to prepare rolls of all able-bodied men, between the ages of eighteen and forty-five, and those lists or rolls are to be filed in the sheriff's office of the proper county. The governor is also to appoint a commissioner for each county, whose duty it is to superintend the drafting, and



hear and determine excuses of persons claiming to be exempt from military duty. Notice is to be given of the time at which excuses will be heard, and all persons claiming exemption must, before the day fixed for the draft, make proof of such exemption before the commissioner, and if the same is found sufficient, his name is to be stricken from the list. A list of those entitled to exemption, under the laws of the United States, is set forth in the order, in addition to which the commissioner is directed to absolve all persons exempted by the laws of the respective states, concerning whom proofs shall be made, or whom he knows of his own knowledge to come within the respective classes. After the rolls are thus corrected and properly prepared, ballots containing the names of all remaining on the rolls are to be placed in a wheel, and a number drawn therefrom equal to the quota fixed by the governor of the state for the proper county, or for any municipality or town, less than a county. It will thus be perceived that the order contemplated that every excuse should be heard before the drawing took place, and that no more names should be drawn from the wheel than was required to fill the quota of the proper county, or smaller precinct; and had the scheme thus been carried out it would have been found that but few persons would have been drafted who were legally exempt. A very small number might have been rejected by the mustering officer on account of bodily disability. But unfortunately, as we conceive, the law was departed from by the state authorities, and the commissioner was instructed to allow excuses if urged at any time before the drafted man was mustered into service. Thus the whole scheme was broken up, and men were tempted to forbear claiming the exemption until after they knew they had been drafted. This is more especially exemplified in the case of persons claiming to be conscientiously scrupulous against bearing arms, who are exempt by the Constitution, but may be required to pay an equivalent. Those persons are to be subject to such penalties as the legislature may prescribe, and all who are exempted by the commissioner for that reason are to be so notified by that officer. But the course authorized is a direct encouragement for them to lie back and not claim this personal privilege at the proper time. If afterwards they chance to be drawn, they will come forward and claim it; but should they escape the draft

they will be exempt from the penalty. The course directed is well calculated to encourage fraud, and, it is feared, will conduce to perjury also. Of those excused after this draft for Hempfield township, seven were for that cause alone, not one of whom had appeared before the commissioner at the prescribed time. It was a personal privilege, and if not claimed according to law should have been disallowed. Had the state alone been interested in this question her officers might waive the time without objection; but as every man whose name was in the wheel had a deep interest in it, I am of the opinion it could not lawfully be waived to his prejudice. To allow excuses after the draft, except for causes which would lead to the rejection of the man by the mustering officer, as for age or personal disability, was a very great irregularity, not authorized by the army orders, so far as they have been exhibited on this hearing. On full consideration, however, we have come to the conclusion that it was only an irregularity, a mere question of time, not such an act as would render the draft void: and irregularities, it is well settled, cannot be reached on a writ of *habeas corpus*. To justify a discharge on that writ the proceeding under which the party is held must be void, not merely irregular: Hurd on Hab. Cor. 332, 333.

A proceeding defective for irregularity, and one void for illegality, may be reversed upon error or certiorari, but it is the latter defect only which gives power to discharge on *habeas corpus*. An irregularity is the want of adherence to some prescribed form. Illegality is properly predicable of radical defects, and signifies that which is contrary to the principles of law, as distinguished from mere rules of procedure. It denotes a complete defect in the proceeding: Tidd's Prac. 434, 435; 1 Mod. 119. Where jurisdiction of the person is to be obtained in a summary way the law must be strictly followed: Hurd 364, 365. And where the sentence of a court-martial was entirely nugatory, the party arrested under its process was discharged on *habeas corpus* by Chief Justice Marshall: 2 Wheeler C. C. 569. It would be otherwise were the action of the officer merely irregular. If the proceeding is void in fact, though the process is good on its face, and might justify the officer, yet the party will be discharged on *habeas corpus*: Hurd 344; 3 Binn. 410. The

distinction between a void and an irregular proceeding is clearly taken by Gibson, C. J., in 1 Watts 66, where it is held on a full examination of authorities, that for the former the party can, and for the latter, he cannot be discharged. Whether there is or is not jurisdiction may be established by proof, and the want of it is fatal: Hurd 370, 371; and it is the settled practice to examine the validity of the proceeding by affidavit: Hurd 308, 309; 1 Burr. 637. Presumptions in favor of regularity and jurisdiction will be made in the proceedings of all the superior courts; but it is not so as to tribunals raised by statute for particular occasions: Hurd 396. A writ of *habeas corpus* is considered an inquisition by the government, at the suggestion and instance of an individual; but still in the sovereign capacity to free the citizen from unlawful restraint, and the thirteenth section of the *habeas corpus* act gives it where the party is deprived of his liberty, "under any color or pretence whatever." In "The King v. Kipel," Lord Mansfield, on affidavit, examined into the regularity of a commissioner's proceeding under an Act of Parliament, passed to raise soldiers, and on finding that the commissioner had proceeded contrary to the act, discharged the soldier from illegal restraint: 1 Burr. 637, 638. The want of conformity to law rendered the proceeding void. To apply these general rules to the present case, we have already stated that we did not consider the exemptions improperly allowed, out of time, was fatally vicious, although an irregularity; but how is it as to drawing more men than was to be furnished by Hempfield township? The Army Order, which has all the force of an Act of Congress, directs the commissioner to cause "to be drawn from the wheel a number of ballots equal to the number of drafted men fixed by the governor to be drawn as the proper quota" for that municipality. This was done, and the complainant was not within that quota. But the commissioner continued to draw until one hundred and ten ballots were taken from the wheel. Was this an irregularity or an excess of authority? Is it void or merely voidable? If void, it does not hold the complainant under the draft, and he is illegally restrained of his liberty. If an irregularity merely, the proceeding must be reversed in the first instance, and the complainant

then relieved by this writ. We are satisfied that there is no process known to the law by which the legality can be tested, or the proceeding reversed for irregularity; and if not void for an excess of power in the commissioner, it is good, and will hold Markley as a soldier.

After the most careful consideration, we have reluctantly come to the conclusion that the over draft was void—that there was no authority in the commissioner to make it. His power ceased the moment he had drawn forty-nine ballots from the wheel, and all names taken out afterwards cannot be treated as a drawing under the law, but in express violation of its directions, and Markley's name must be considered as one not drawn; but he stands in the situation of a person forced into the service without being drafted. The jurisdiction of the commissioner ceased when he drew the number prescribed; and an act done without jurisdiction is clearly void, and must be so declared on *habeas corpus*: 1 Dall. 135. Such was the opinion also of Lord Mansfield, where the drafting commissioner exceeded his jurisdiction in the case already cited from 1 Burrows 637. Nor does this come in conflict with, but is in precise conformity to what is said by Chief Justice Marshall in the case of T. Watkins, 3 Peters 202, 203; and also in Bollman & Swartwout's Case.

It is said, however, on behalf of the United States, that the complainant voluntarily appeared before the mustering officer and took the prescribed oath to serve in the army, thereby waiving all irregularities. The only evidence we have that he was sworn, is the return of the respondent who certifies that he was "mustered into the service of the United States." When or how is not stated; it is not stated but is contended, that he must have been sworn at the time of mustering in. The evidence shows that Markley was notified of his being drafted, and was sent to Camp Curtin under charge of a lance sergeant, according to the army order. No act of his appears to have been voluntary, but was apparently compulsory. And where the draft is void, it would require some distinct act of volition on his part to make that good which was void from the beginning. There must be a new contract of service voluntarily entered into to render it binding. When a man is thus drafted, and afterwards joins a

volunteer corps, or procures a substitute to serve in his stead, he could not be relieved. Nor would he have cause of complaint, as his own subsequent act bound him, and not the irregular draft. He was as much bound to know the law as was the commissioner, and should have claimed a discharge by legal process instead of obtaining another to serve for him.

We have no doubt that the executive of this state was actuated by the purest motive in permitting excuses to be heard afterwards, which the law contemplated should be presented to the commissioner and determined before the drawing commenced. But good motives will not cure illegality. It was known to the governor that many persons having legal excuses had failed to present them, and the object was to relieve such from the hardship of performing military duty against conscience, or where they were by law entitled to exemption. But it should be borne in mind that the law assists the vigilant, not the negligent or sleepy. The commissioner also believed that he was not only doing his duty, but favoring the citizens and benefiting the service by giving the one more time to prepare than would be allowed should it become necessary to make a new draft, and securing to the nation in any event the quota required from the county.

This would all have been well had the law made such provision, but as it did not, the commissioner could not secure men by that course. If the necessary number was not obtained, a new draft must be directed by the President. We cannot for a moment permit any question to be raised as to the validity of this Act of Congress, the power of the President, or the general regularity of the proceedings under which the draft was effected in this state. Those regularly drawn under the army orders must render service to the country, but in this particular case the complainant must be discharged.

Our apology for examining this question at such length must be found in the fact that the service of over one hundred soldiers depends on the correct disposition of the question, although the liberty of a single citizen is determined by this decision.

November 29, 1862, it is ordered that John Markley be discharged from the control and custody of Col. Everard Bierer,

and that he be relieved from the service of the United States. We decline to give any costs in this case as against the respondent, who was in the discharge of his duty and acting in good faith.

See Turner's Case, *supra*, 370; Galgallon's Case, *supra*, 377; Wendt's Case, *infra*, 402; Henderson's Case, *infra*, 440.

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*In the Common Pleas of Allegheny County.*

WOODWARD v. ROOT.

(Vol. X., p. 187. 1862.)

1. The presumption of coercion which the law raises when the acts complained of are done by the wife in the presence of the husband, is *prima facie*.
2. Therefore, to maintain an action against them for their joint act, the declaration should itself set forth facts, or contain allegations, negating this presumption.

MOTION in arrest of judgment.

*John T. Cochran*, for the motion.

*Thomas B. Hamilton*, *contra*.

The facts are sufficiently set out in the opinion of the court, delivered December 27th, 1862, by

STOWE, A. J.—This action was brought by Louis B. Woodward, the plaintiff, to recover damages for malicious prosecution. Upon trial, the plaintiff having obtained a verdict, a motion is made to arrest judgment thereon, on the ground that the declaration does not set forth such facts as (admitting them to be true) will authorize an action in the present form. The very singular and anomalous declaration (if indeed it deserves such a name), after stating that plaintiff complains of the defendants for maliciously contriving to injure plaintiff, goes on to give a kind of

narrative of the transaction connected with the institution of the prosecution for larceny against plaintiff, stating the information to have been made by Root, the issue of the search warrant, the journey to Sharpsburg by the officers and both defendants, and the search of plaintiff's house there in which both participated, and then the arrest of plaintiff, holding to bail for appearance at court, and the ignoramus of the bill by the grand jury, &c., and then concludes with a count, all the material averments of which are against Root alone.

If the declaration is to be construed as setting forth the acts done (so far as they were material allegations) to be those of the husband, as seems to be the general intention of the pleader, of course this action cannot be sustained. But if it is to be treated as a declaration setting forth substantially that the original prosecution was instituted and carried on by the joint act of husband and wife, then the question arises, can such an action as this be sustained under that state of facts?

The general rule of law is, that if a crime be committed by the wife in company with or in the presence of her husband, she acted under his immediate coercion, and will be excused from punishment; but if she commit a crime of her own voluntary act, or by the bare command of her husband in his absence, or be guilty of treason, murder, or robbery, or any other crime *malum in se* and prohibited by the law of nature, or which is heinous in its character, or dangerous in its consequences, even in company with or by coercion of her husband, she is punishable as much as if she were a *feme sole*: Whart. Crim. Law 71.

Applying this principle to the case in hand, it is not necessary to go so far as Chancellor Kent in his 2d vol. Comm. p. 194, where he states that for the tort and frauds of the wife committed during coverture in the company of the husband, he alone is liable; but simply to say that the presumption of coercion which the law raises when the acts complained of are done by the wife in the presence of the husband, is *prima facie*; and that therefore the averments in the declaration, giving them their broadest intendment, would in law only raise a liability on the part of the husband alone. Even assuming that such an action as this could be maintained under certain circumstances against husband and

wife for their joint act, it is apparent that the declaration should itself set forth facts, or contain allegations, negating the presumption of law that the act of the wife done in the presence of her husband was done under his coercion. There is no pretence that such is the case here, and as I deem the declaration entirely insufficient to support the action against the wife, the judgment must be arrested.

Judgment arrested.

See Hilliard on Torts 512.

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*In the Court of Common Pleas of Allegheny County.*

**MAGOGNEY v. REED.**

(Vol. X., p. 187. 1862.)

Where one purchases real estate by articles of agreement made with a husband only, in which is a covenant for a title clear of encumbrance, and the vendor's wife refuses to execute the conveyance, the purchaser may refuse to take the land, and bring his action on the covenant. But if by promise of a consideration he induces the wife to join in the deed he is liable to her therefor.

*Penney*, for plaintiffs.

*Shannon*, for defendant.

The facts are fully stated in the opinion of the court, delivered December 20, 1862, by

STOWE, A. J.—This is a case stated for the opinion of the court, upon these facts: The defendant having entered into a contract or agreement in writing for the sale of certain coal land, with William Magogney, one of the plaintiffs, in which it is assumed there was the ordinary covenant for a title clear of encumbrance, &c. (the agreement having been lost). When the plaintiff and defendant came together to execute a deed for the land and pay or secure the purchase-money, the wife of Magogney, the plaintiff, “refused to sign the deed to Walker Reed, the



defendant, unless he would buy her a new dress," which he agreed to do if she would sign the deed, whereupon she did sign it. The price of the dress, in case plaintiff should be entitled to recover, is fixed at \$25.

The only question is whether the facts stated create a legal liability on the part of defendant to pay the value of the dress (viz. \$25). It is alleged on the part of the defendant that this promise is a mere *nudum pactum*, unsupported by any consideration, and that therefore it was null and void. If this is so, then of course the plaintiff is not entitled to our judgment, but I am unable to arrive at any such conclusion. Magogney had agreed to convey land to Reed free from encumbrance, but when his wife was called upon to sign the deed she did what she had legally a perfect right to do, refused to execute the conveyance. She was in no respect bound by the covenant in the article of agreement. Here then defendant had a right to refuse to take the land and bring his action on the covenant, or make such other arrangement as he could, which might most accord with his opinions as to what was most advantageous for him. He chooses the latter course and enters into an agreement, by which he promised if Mrs. Magogney would execute the deed and thus divest her dower interest in the land, which nothing but her own consent could accomplish, he would give her a new dress worth \$25. The statement of the proposition would seem to be a complete answer to the defendant's argument. The essence of every consideration is that it should create some benefit to the party promising, or some trouble, prejudice, or inconvenience to the party to whom the promise is made. Here then is a benefit to the defendant, for he gets a clear title; and there is prejudice to the wife, for she gives away her prospective right of dower in the lands. Even throwing out of view the benefit and injury, it is quite sufficient that the wife did that which she was under no legal obligation to do, at the request of defendant, and to secure the promised dress, although the act might have been no real loss to herself or advantage to defendant.

Judgment must therefore be entered in this case in favor of plaintiff, and against defendant, for the sum of \$25, with interest from August 6th, 1859, to wit: \$30 08.

*In the Oyer and Terminer of Allegheny County.*

COMMONWEALTH v. GEORGE CHILDS.

(Vol. X., p. 209. 1863.)

1. The unlawful carnal knowledge of a woman, forcibly and against her will, under the 91st section of the Penal Code, is the same offence as rape at common law.
2. Where the consent of the female is obtained, though by fraud or deception, there is no rape; but connection with a woman when insensible or unconscious, from whatever cause, is rape.
3. Absence of assent will constitute rape, except where the female is under ten years of age; but assent after the act is no defence. Where consent is given and withdrawn before the act, if the same is forcible and against consent, the offence is complete.
4. Where there is nothing to deter the woman from resistance, and she is conscious and able to show dissent, and does not do so, it will be taken as her assent. A doubtful or mixed case will not make out the offence.
5. The jury are the sole judges of the credibility of witnesses, and are not bound to believe the testimony of any witness, although it may not be expressly contradicted by other evidence.
6. Defendants in rape are put to rely upon circumstantial evidence for their defence, and any fact tending to the inference that there was not the utmost reluctance and resistance, should be received in evidence. The material issue is the willingness or reluctance of the female.
7. The jury should be satisfied beyond a reasonable doubt to convict.
8. Corroborating circumstances are not absolutely necessary, but their absence is ground of suspicion. The absence of any corroboration most singular, and doubted whether a jury should convict in any such case.
9. Where the prosecutrix swears to facts, which, if true, are susceptible of proof by others, and the proof is not produced, it is, unexplained, a circumstance of suspicion, but by no means conclusive. Long delay of prosecution, a matter to be considered by the jury.
10. Medical testimony not a matter of importance, where the body of the offence can be made out without it.
11. Reasonable doubt explained.

THIS was an indictment for rape, charged to have been committed by defendant upon the body of Miss Clara Blanche Naylor, the prosecutrix.

For the prosecution, *Charles Shaler, Marshall Swartzwelder and Jacob H. Miller.*

For the defendant, *Thomas M. Marshall* and *John H. Hampton*.

The case occupied the attention of the court, Hon. Edwin H. Stowe presiding, from Tuesday morning, January 6, 1863, till Friday night following.

The testimony was voluminous, relating in detail many conversations and circumstances not leading strongly to conclusions either way. The only positive evidence that the offence charged was committed, was given by the prosecutrix herself.

*Defendant's points and answers of the court thereto :*

1. That the charge of rape is one easily made and hard to be defended by the accused, though ever so innocent. That in proportion to the detestible character of the charge the proof should be the more clear and conclusive to justify a jury in convicting the defendant.

*Answer.*—You must be satisfied beyond a reasonable doubt of the truth of the charge. If you are, you should convict. If you are not, it will be your duty to acquit.

2. That from the necessity of the case the party accusing is admitted as a competent witness, yet her credibility is for the jury, and if from all the facts and circumstances of the case the jury have a reasonable doubt of the guilt of the defendant, it is their duty to acquit. Affirmed.

3. That in estimating the credibility of the accuser's testimony the jury should be guided by the rules of law, which require the proof of certain corroborating circumstances. Such as: that she presently discovered the offence and made pursuit after the offender; showed circumstances and signs of the injury, whereof many are of the nature that only women are the most proper examiners and inspectors; if the place of the offence was remote from people, inhabitants and passengers; that these and the like when proved by others as well as herself, give greater probability to the accusation, and the absence of these concurring circumstances carries a strong presumption that the accusation is false.

*Answer.*—The rules of law do not absolutely require the proof of the corroborating circumstances specified in this point, but their absence, is ground of suspicion. There may be other cor-

roborating circumstances which would go to sustain the evidence of prosecutrix.

The absence of all corroboration would be a most singular case. I much doubt whether any jury should convict under such circumstances.

If the prosecutrix swears to facts, which if they existed, were susceptible of proof by others than herself, as for instance, blood upon her clothing, or a bruised side, both or either of which might have been exhibited to other persons, the testimony of whom would be strongly corroborative of her story, and such exhibition was not made, or at least, of which there was no evidence produced, it would be a proper matter for the consideration of the jury, and without satisfactory explanation would be a circumstance of suspicion, although by no means conclusive as to the falsity of her evidence.

4. That the circumstance of this criminal charge against the defendant, being made nearly eight months after the alleged offence, is a most weighty fact, which the accuser should explain by evidence, and the duty and burden of explanation is upon the accuser.

*Answer.*—The long delay of prosecution in a case like this, is a circumstance for your consideration, in connection with the other facts in the cause, but it is entirely for you to say how much weight it should have in your deliberation.

5. That it is a salutary rule of policy, sanctioned by the law, and which juries should enforce, in no case to sustain a prosecution for rape, unless the accuser's testimony is corroborated by the testimony of experienced persons, medical or otherwise, who were called in to inspect the person of the accuser, as soon after the occurrence as the circumstances of the case would allow.

*Answer.*—Where medical testimony is necessary to satisfy the jury that a rape has been committed, or to make out the body of the offence, as where the person violated was insane, or laboring under delirium at the time, and could not swear to the consummation of the offence, the absence of such testimony would of course compel the jury to acquit; because the body of the offence would not be made out; but I cannot say, as a matter of law,

that in ordinary cases (or in this case) it is a matter either of serious consideration or importance.

6. If the jury have a reasonable doubt, either as to the violation of the body of the prosecutrix, and by the defendant, or that the violation was forcible and against her will, it is their duty to acquit. Affirmed.

The charge of the court was as follows :

GENTLEMEN OF JURY :—It is a subject of congratulation to both court and jury, that we are approaching the termination of a trial, the consideration and details of which are so disagreeable to all of generous impulses or refined sensibility.

It is also a matter of great gratification to us all, that eminent counsel, notwithstanding the nature of the cause was peculiarly calculated to arouse the passions, and excite the temper, have been able to restrain themselves to such a remarkable degree, and that they have acted throughout with such marked propriety and decorum toward each other, as well as toward the court.

I am happy to state here publicly that the court highly commend the conduct of the learned counsel in the cause, from the beginning of this trial to the end of their participation in it.

Their work for the present is over, and well and ably have they discharged it. Shortly too, the court will have terminated its connection with the cause, and upon you will then devolve the responsibility of coming to a conclusion upon the evidence before you, under the instruction of the court upon the law of the case.

The defendant, George Childs, stands indicted before you under the 91st section of the Act of Assembly of 1860, called the Penal Code of Pennsylvania, "for having unlawful carnal knowledge of Clara Blanche Naylor, forcibly and against her will," or what is called in the law, rape.

The offence is one of the most detestable in the whole catalogue of crime. It used in early days to be punished with death, not only among the Romans and Athenians, but also in England, whence we derive our law upon that, as upon other subjects, and in this state previous to 1794. The death penalty for

this offence was abolished in England long since and has never to my knowledge been imposed in this state.

By our revised Penal Code the punishment now is a fine not exceeding \$1000, and imprisonment by separate or solitary confinement, at labor, not exceeding fifteen years.

Rape is defined to be, and described in the act, the unlawful carnal knowledge of a woman forcibly and against her will. It was at one time held that to constitute and complete the offence, it was necessary to prove emission in the body of the female, but such is not the law now, either in England or here, but penetration alone is sufficient, even though the fact of emission be negated by the evidence.

The act, that is to say, the connection, must be done forcibly and against the will of the female. No amount of persuasion or solicitation however improper, no amount of deception or even fraud however villainous or outrageous, will make illicit intercourse constitute rape, where the woman, induced or persuaded, consents to the act. Thus where a man by fraud went to bed with a woman that was married, and she believing him to be her husband, allowed him to have connection with her, it was holden not to be rape, because of her consent although fraudulently obtained; and the same when under similar circumstances the wife consented at first, but while in the act, she discovering that it was not her husband, made what resistance she could to prevent its completion.

But on the other hand, if a man by giving a woman drugs or liquors, renders her insensible, and then has connection with her, in that condition, it is rape, although his original intention was simply to excite criminal desires, for the purpose of more easily persuading her to consent to the act, and not with the purpose of rendering her insensible and having connection with her in that state. So also where a man discovers a woman laboring under delirium, which rendered her insensible to his act, and has illicit connection with her it is rape. And in this case, if the prosecuting witness, Clara Naylor, as she states, upon discovering the intention of the defendant, resisted and opposed his attempt to have connection with her in the manner she testifies to, and then

fainted or became unconscious from fear, excitement or other cause, and while she was in that condition, defendant had carnal knowledge of her body, although she was incapable of, and made no resistance to the act itself, it would be clearly and unquestionably rape, as charged in the indictment.

Dissent where the female is conscious, and in every case the absence of consent, is absolutely necessary to make carnal knowledge felonious, or to constitute it rape, except, in the language of our Penal Code, in case of a woman-child under ten years of age, in which case carnal knowledge, even with consent, is made the same offence as though the act was done against her consent.

Where the child is under ten years of age, the statute—and in other cases, where the woman was in a state of insensibility from disease, liquors, drugs, affright or other cause, so as not to be conscious of the act, the common law—incontrovertibly implies dissent and force, although in fact there may be neither. But where, as in the cases already stated to you, the consent to the connection is given and continued up to the time of penetration, even where the woman is under an entire mistake, brought about, too, by the perpetrator of the act himself, for the very purpose of obtaining her consent fraudulently, the offence of rape is not committed, whatever other offence against law and decency may be.

The allegation of force and the absence of consent, necessary to constitute the offence, may be proved by any competent evidence, showing either that the person of the woman was violated or her resistance overcome by fear of great personal injury. In either case the crime is complete, though she may have ceased all resistance before the act itself was finally consummated; and even if she at first consented to the act, but before the act withdrew her consent, and was afterwards forced against her will; or was first violated and afterwards forgave the ravisher and consented to the act, still the particular offence in question, being committed with force and against her will at the time of its commission, the crime is in legal estimation completed; these circumstances being only admissible in evidence to disprove the allegation of want of consent.

But where there is no duress, nor threats, nor putting in fear, so as to deter the female from resistance, although she may not actually consent, mere passiveness or absence of assent on her part, if she is conscious and able to express or indicate dissent, will not be such a state of facts as will constitute rape; but, on the contrary, should be taken by the jury to be her assent to the act. In other words, the absence of acts showing clearly her dissent in such case ought to be taken as her consent. "A mixed case (*People v. Abbott*, 19 Wend. 192, Cowen, J.) will not do; the connection must be absolutely against the will."

There must be no half consent and half refusal; any assent will be taken as absolute consent, and would relieve the act from the character of rape. So far, I have only been treating of those matters which go to make up the offence, supposing there was no dispute nor difficulty about the facts, involved in the cause. I have been looking simply at the sufficiency or insufficiency of the testimony in this and kindred cases, to constitute the offence charged, supposing it to be all taken as true.

It now becomes our duty to look to the other side of the case, and to indicate to you some rules and principles which have been established by the law as proper matters for your consideration in coming to a conclusion upon the question involved in the case in hand.

I need scarcely remind you, that you are under no legal obligation to believe any witness that may be examined before you, simply because he or she may have spoken under oath. But you should be equally cautious against disbelieving a witness, from mere whim, caprice, or surmise. And although you are the sole and absolute judges of the evidence; and of the credibility of witnesses, having the power and right to believe one and to disbelieve another, it is your duty, of course, to bring to bear, in your consideration of these things, those rules of propriety and common sense, and that knowledge of human nature and of the affairs of life, which should govern men of judgment and practical experience in the investigation of serious and important subjects.

I can do no better in this connection, than to quote to you here the words of Lord Hale, once Chief Justice of England, one



of the most enlightened, far-seeing, and Christian judges of his day, and one whose name has come down to the present time, a synonym with legal wisdom and excellence,—words which should in my opinion be repeated to every jury which has before it the consideration of such a charge as you are now called to pass upon, and which I now read to you :

“Rape is a most detestable crime and therefore severely punished ; but it must be remembered that it is an accusation easily made, but difficult to be disproved by the party accused, be he ever so innocent ; and therefore, though the party ravished be a competent witness, yet the credibility of her testimony must be left to the jury upon the circumstances of fact that concur with that testimony ; if the witness be of good fame—if she presently discovered the offence and made pursuit after the offender—if she showed circumstances and signs of the injury whereof many are of that nature, that only women are proper examiners—if the place where the fact was done were remote from inhabitants or passengers—if the offender fled for it, these and the like are concurring circumstances which give greater probability to her evidence. On the other hand, if she be of evil fame and stand, unsupported by other evidence—if she conceal the case for any considerable time after she had an opportunity to complain—if the place where the fact is supposed to have been committed, were near to persons by whom it was probable she might have been heard, and yet she made no out-cry—if she gave wrong description of the place, if she fixed upon a place where it was improbable for the man to have access to her, by reason of his being in a different place or company about that time, these and the like circumstances afford strong, though not conclusive, presumption, that her testimony is feigned :” 1 Hale 623-625.

These offences, as well as the kindred moral crimes of mere seduction, to which, on examination, they often dwindle down, are in their very nature committed under circumstances of the utmost privacy. The prosecutrix is usually the sole witness to the principal facts, and the accused is put to rely for his defence on circumstantial evidence. Any fact tending to the inference that there was not the utmost reluctance, and the utmost resistance,

is always received. That there was not an immediate disclosure, that there was no outcry, though aid was at hand, and that known to the prosecutrix; that there are no indications of violence to her person, are put among the circumstances of defence, not as conclusive, but as throwing distrust upon the assumption that there was a real absence of assent: 1 Hale P. C. 688. The material issue in all cases of rape being on the willingness or reluctance of the prosecutrix—an act of the mind: Cowen, J., in *People v. Abbott*, 19 Wend. 192.

Upon this question, gentlemen of the jury, with the principles of law, and the suggestions to guide your conclusions already stated, you will turn your attention to the facts and circumstances detailed by the various witnesses examined before you.

I shall not undertake to repeat any of them to you. The learned counsel, on each side, have done so at considerable length, and with great skill and ability, have placed before you their respective views concerning them.

You, in making up your verdict, must be governed entirely by the evidence in the case; carefully sifting and examining the testimony, and bearing in mind all those matters which may be indications of the guilt of the defendant, or of the falsity of the charge against him, as the circumstances surrounding the alleged offence, may, in your opinions, tend to prove the one or the other; carefully and conscientiously avoiding altogether all matters having nothing to do with the issue you have been selected to try—such for example, as the personal appearance, inexperience and accomplishments of the female, upon whom the offence is alleged to have been committed—the high character, public services or present distress of her father, or the wealth of social position of the defendant or his friends. With all such matters as administrators of the law of the land, you and I have nothing to do, and they should be banished from your minds altogether. This case comes before the court and jury just as any other, and it is our duty to regard it in no other light than we would if both parties and their friends and relations were from the most obscure and humble walks of life. The law knows no distinction between rich or poor, high or low, distinguished or unknown. It metes out equal and even-handed measure to all alike.

Neither should you look beyond your verdict for the purpose of getting arguments to base that verdict upon. With the result of either a conviction or an acquittal you have nothing to do. Whether the one by your verdict shall be branded as a felon or the other stigmatized as a perjurer, are matters not properly falling under your consideration. It must not in our duty here concern us, upon whose head or heart the blow will fall. You have each been solemnly sworn "to well and truly try" the defendant, according to the law and the evidence, and upon them alone should your verdict be founded.

If you believe the evidence of Clara Blanche Naylor, the witness examined before you for the Commonwealth, that George Childs had carnal knowledge of her body, and that she struggled to prevent it, using as she states, all her power to do so, until she became unconscious, when the act was finally and fully consummated, it will be your duty to convict the defendant of rape, as charged in the indictment. But if upon consideration, of all the facts and circumstances in evidence, you are not fully satisfied, so far as violence and want of consent are concerned, but have upon that question a reasonable doubt, it will be your duty to acquit, even though you should have no doubt that the defendant had illicit intercourse with the prosecuting witness at the time and place she states the rape to have been committed, or elsewhere. You must not confound criminal connection where the female consents, or makes no resistance or objection, and the offence of rape, the very essence of which is violence and force against consent.

The doubt—termed in law books "reasonable doubt"—which will justify you in acquitting upon that ground must be a state of mental uncertainty arising out of the testimony in the case, the facts and circumstances of which under the direction of the court have been given in evidence to you as bearing upon the issue.

It must not be some mere fancy of the imagination—some ideal, unsubstantial figment of the brain conjured up outside of the evidence, as a possible hypothesis of innocence unfounded in any reasonable view of the testimony, but some substantial and tangible perception, which, arising out of the facts and circum-

stances before you, would cause you to hesitate and pause as to the guilt of the party charged.

In all criminal cases the evidence must be satisfactory, and the guilt of the accused be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence is sufficient, unless it generate full belief of the fact.

If, after the comparison and consideration of all the evidence you cannot feel an abiding conviction, to a moral certainty, of the truth of the charge, you should acquit; for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. To convict, your conclusion should be clear, and your minds rest unhesitatingly upon it when arrived at.

I have, gentlemen, been thus particular in laying down to you these various principles of law (many of which will not come in question in this case) in reference to the crime of rape, that you may be able to apply the proper legal rule as you get it from the court to any state of facts, which you may conclude to be satisfactorily established by the evidence touching the carnal knowledge (if any there was) of Clara Blanche Naylor by George Childs, on on the 2d day of August, 1861. Only anxious to say those things, which it becomes my duty to say, in such manner as might be most likely to assist you in coming to a conclusion, warranted by the law and the evidence, I have sought to avoid any expression or indication of opinion on the facts in this case. These you have been sworn to pass upon, regardless of the opinions or wishes of others, and for the correctness of your conclusions, you, and you only, are answerable to God and your consciences.

*In the Court of Common Pleas of Dauphin County.*

## COMMONWEALTH EX REL. WENDT v. ANDRESS.

(Vol. X., p. 211. 1863.)

1. The order of the President, under the Act of Congress conferring on him the power of prescribing the *modus operandi* of calling out the militia, has all the force of an Act of Congress.
2. A drafted militiaman so called out cannot pay a fine in lieu of service.

PEARSON, P. J.—The complainant has sued out this writ, averring that he is unlawfully deprived of his liberty by being confined in Camp Curtin, without authority. To this the respondent replies that he holds the complainant as a regularly drafted militiaman, drawn for the service of the United States, and delivered to him as commandant of Camp Curtin, by a provost guard, he being brought in as a deserter. It appears very clearly on the hearing that the complainant never was a deserter, in the ordinary sense of the word, but that when drafted he neglected and refused to attend, and was brought here by the guard.

Two questions have been raised by his counsel. First, that no provost marshal was regularly appointed, and therefore the guard had no authority to arrest him; and second, that when drafted it was optional with him to attend at the place of rendezvous, or remain at home and pay such fine as should be imposed on him by a court martial, under the 5th section of the Act of February 28, 1796.

We are not authorized under this writ to inquire into the regularity of the provost guard's action, as the complainant was not in their custody when it was sued out, and the object of the writ of *habeas corpus* is to relieve those unlawfully restrained of their liberty, not to decide on the regularity of the process under which they were seized, unless possibly in the case of an abuse of the court's process which issued the writ. If the complainant is in the lawful custody of the respondent, we have no right to inquire how he came there, whether voluntarily or by compulsion; the only question for us to determine is, is he now unlawfully

restrained of his liberty? We have nothing to say as to the action or power of the provost guard.

Has a drafted militiaman the option to pay a fine or serve his tour of duty?

To determine that he had such choice, and can escape personal service by paying a fine not exceeding ninety-six dollars, under the Act of 1796, would be to destroy the whole service and render the draft abortive. It might, under many circumstances, and even under those now existing, lead to the subjection of the country and subversion of the government. Nevertheless, if Congress, through its negligence, has failed to provide any other means than that found in the law cited, to oblige the citizen-soldier to perform his duty, he has the legal right, however it may conflict with patriotism, to escape the service, and pay, in its stead, the small pecuniary penalty.

As we understand the Act of Congress of February 28, 1796, it by no means leaves it optional with the militiaman regularly called into service to pay a fine or perform his duty. On the contrary, we consider that the fine was intended to be imposed, at the option of a court martial as to the amount, in those cases where personal attendance from any cause could not be enforced, making it low where it arose from involuntary causes, and higher when from perversity; and the penalty is not only to be imposed for non-attendance, but for failure to obey any order of the President under that act. If the person of the militiaman can be seized and brought to the rendezvous, he is mustered into service and becomes at once subject to the articles of war and the ordinary military control. If he evades seizure or escapes from the service before being mustered in, and cannot be retaken, or if he is unable to attend at the place of rendezvous from physical disability, his case is to be heard by a court martial, and he be fined more or less, or excused, at the discretion of that tribunal.

It is true that Mr. Justice Story, in his dissenting opinion in the case of *Houston v. Moore*, 6 Wheat. 1, says that the drafted soldier has it in his power to attend or is subject to a fine. Yet the point did not arise in the case, and what is there written must be considered an *obiter dicta*. From the reasoning of the

same learned judge in *Martin v. Mott*, 12 Wheat. 19, we can collect the following positions: That the President of the United States must judge when the exigency arises for calling out the militia of the respective states to enable him to see that the laws are faithfully executed, and is an incident to the duties of superintending the common defence, and watching over the internal peace of the Republic. That the right to enforce the attendance is an incident to the right to call, and the whole is a military power to be carried out by the head of the nation as commander-in-chief. But we are of the opinion that this case does not turn on the proper construction of the Act of 1795, but on that of 1862, providing for drawing the militia to serve for a period not exceeding nine months, and conferring the power upon the President to prescribe the *modus operandi*. Under the authority of this act was issued Army Order No. 99, in which the whole method of selecting, drawing and enforcing the attendance of the militia of the respective states is pointed out.

This order having been authorized by the Act of Congress, must be considered as having all the force of a law, the same as if specially set forth at length in the act, and it prescribes a special method of enforcing the presence of the drafted men at the place of rendezvous, directed to be fixed by the governors of the respective states. One provision of the order is, "provost-marshals will be appointed by the war department in the several states on the nomination of the governors thereof, with such assistants as may be necessary to enforce the attendance of all drafted persons who shall fail to attend at the places of rendezvous." If this provision had been embodied in the Act of 1862, which is supplemental to the former law, it could scarcely be pretended that personal attendance by the party drawn or his accepted substitute was not contemplated, or that he had an option to pay a pecuniary mulct in lieu thereof at his option, and the validity of the whole enrolment and draft depends on that order.

I am clearly of the opinion that the order was valid, and must have the force of an Act of Congress, that the attendance of drafted men at the rendezvous may be enforced in the mode prescribed, and that when drawn they have no option to pay

money or render service, but may be obliged to perform the latter. But should the provost-marshal fail to bring the men to the place of rendezvous, then the fine may be imposed by a court-martial under the Act of 1796, and this according to the cases already cited, may be enforced even after peace is determined. It is ordered that John Wendt be remanded into the custody of the officer in command at Camp Curtin, as a regularly drafted militiaman.

See Turner's Case, *supra*, 370; Galgallon's Case, *supra*, 377; Markley's Case, *supra*, 380; Henderson's Case, *infra*, 440.

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*In the United States Circuit Court for the Western District of Pennsylvania.*

EVANS ET AL. v. CITY OF PITTSBURGH.

(Vol. X., p. 233. 1863.)

1. In conformity with the decision of the Supreme Court of Pennsylvania, the Act of Assembly of Pennsylvania of 15th April, 1834, which provides a mode for enforcing the payment of judgments against counties and townships, will, in this court, be applied to cities also.
2. The construction by the state Supreme Court of their own peculiar statutes is conclusive in this court.
3. The annual estimate by county commissioners as to the funds needed for the coming year, whether right or wrong, is not an "appropriation" of them to pay any particular debt due by the county; consequently, the judgment of the court is the first appropriation and should have precedence: Pollock v. Lawrence County (*supra*, p. 137), re-affirmed.
4. To enforce execution against the city, if there be no unappropriated funds in the treasury or none appropriated to the payment of the judgment in the case, the mandatory process should issue to the city councils, as the legislative power, and the mayor and controller, the proper executive officers, whose duty it is to "cause the money to be paid," and who only have the power.
5. If, after a due performance of their several duties, the treasurer, who is their officer and servant, should refuse to perform any duty imposed on him, or attempt, by ingenious devices, to evade the performance of it, he may be treated as for a contempt by serving the proper process upon him for the purpose.

*Hamilton & Acheson*, for plaintiffs.



*Veech & White*, for the city officers.

Motion for attachments against the controller and treasurer of said city.

GRIER, J.—The plaintiffs obtained their several judgments against the city of Pittsburgh, at May Term, 1861, for interest due in 1852 and 1853 on coupons on railroad bonds. At November Term, 1861, the plaintiffs' attorneys applied to the court by petition to direct "that a mandatory writ be issued, directed to the controller and treasurer of the city, commanding the said controller to prepare and deliver to the said plaintiff or his attorney, a warrant on the treasury for the amount of the judgment, payable out of any money in the treasury, or if there be no money in the treasury, then out of the first money that shall come into the treasury," &c.

The court made the order requested, no question having been made as to whether it was directed to the proper persons or not. It was entirely *ex parte*, and without notice to the defendants' attorneys. They have, therefore, a right to meet the rule in this case for an attachment, by an allegation that the mandamus writs which have been served on those officers, have been improvidently issued, and that the process should have issued to the mayor and city councils; and, consequently, that the court, instead of enforcing obedience to the mandatory process, should set it aside as irregular and void.

The Supreme Court of Pennsylvania has decided that the Act of 15th of April, 1834, which provides a mode for enforcing the payment of judgments against counties and townships, should be applied to cities also. In conformity with which decision this court decided in the case of *Evans v. The City*, that such process might issue from this court to enforce the payment of judgments obtained in the Circuit Court of the United States.

To what officers of the corporation should this mandatory process issue.

The law requires it to issue to the commissioners who have the taxing power. "The only means that a municipal corporation has for the payment of its liabilities is the power of taxation:" 4 Casey 210. Its property, necessary for public purposes, can-

not be levied on or sold. The command of the mandatory writ authorized by the statute is, "to cause the amount of the judgment, with interest and costs, to be paid, &c., out of any moneys unappropriated of such county; or if there be no such moneys, out of the first moneys that shall be received for the use of said county."

The proper party, therefore, to such process should be those who have the power of taxation, who have the executive and legislative powers of the corporation, and can "cause the money to be paid." The treasurer is but the servant of this power; he is merely the collector of the city taxes, and the custodian of its funds, bound to receive and keep them as city councils may direct, and to pay them out only upon the warrants of the mayor, countersigned by the controller, and drawn upon specific appropriations made by the councils according to law.

The answer of the treasurer to the interrogatories sets forth clearly and correctly his position in this matter, and contains the statement of facts which we must assume to be correct, for the purposes of the present motion.

In answer to the seventh interrogatory he states, that "the judgments of the plaintiffs had not been paid either in whole or in part, because there was no money in the treasury which could be legally appropriated to such payment. All the moneys that have been received in the treasury, and all the moneys now in the treasury, have been and are specifically appropriated by ordinances of the city councils, under Acts of Assembly, authorizing and directing the same to be done. The Act of 6th April, 1850, directed that the councils should each year previous to the annual levy, assign and appropriate the revenue of said city derivable from all sources, and prescribed the order in which it should be applied, to wit: 1st for the payment of interest for the funded debt; 2d, the payment of salaries of city officers; 3d, for the payment of the ordinary current expenses of the city, and 4th, for extraordinary improvements, erections, and purchases, and if there be any surplus it is to be paid into the sinking fund created by the said act. The Act of 10th of May, 1857, directed that the moneys arising from the assessments for grading and paving should be paid into the sinking fund and should be applied to the

same purposes, and held under the same restrictions as the other moneys of that fund."

"In pursuance of said acts the city councils did, in the month of January in each of the years 1861 and 1862, 'assign and appropriate' all the revenue of those years respectively to and for the purpose authorized and directed by said act. There has not, therefore, any money come into the hands of the city treasurer, and there is now none in his hands which, as he has been advised, he could have legally applied, or which he can now legally apply to the payment of the plaintiff's judgments."

The funded debt here mentioned in the act is the old debt incurred for the cost of erection of the water-works, &c. These bonds of the city for railroad purposes have all been issued since the passage of the act above referred to. It was the duty of the city councils to assess a tax sufficient to liquidate the interest of the bonds as it became due. Instead of an honest endeavor to meet their liabilities, and support the credit and honor of the city, the councils have chosen to litigate and repudiate their obligations, to obstinately resist every process of the courts and evade the performance of their official duties. "*Pudet hæc opprobria dici et non potuisse repelli.*" From the public legal history of the courts, we see that the Supreme Court have by mandamus endeavored to compel a faithful execution of these duties: but it does not appear from the facts in evidence that one dollar has ever been raised for the purposes of paying off these judgments.

It is no fault of the treasurer that he has no moneys of the city "unappropriated" in his hands. He has acted in this matter with integrity and honor. We cannot give two definitions to the terms "assign and appropriate" as used in the Act of 1850, and the negative "unappropriated" in the Act of 1834. It was the duty of the councils to increase their assessments to a sum sufficient to cover the payment of these interest coupons, and "assign and appropriate" a sufficient portion of the money in the same order as directed by that act for the payment of the interest of precedent debts. The honor, credit and character of the city and its citizens are as much bound to see the interest paid on their late debts as on their earlier ones. The fact that the money first borrowed was judiciously expended, and

the latter not, can make no difference to the grade of the obligation. A conscience, it is said, cannot be imputed to a corporation; but the corporators and citizens, who enjoy its franchises, will be held as morally if not legally responsible before the world.

The case of *Monaghan v. The City of Philadelphia*, 4 Casey 207, is cited as having definitely settled the question. If a case presenting the points raised in this case, and on the same state of facts, had been decided by the Supreme Court of the state, it would have relieved my mind very much in the decision of this case. Their construction of their own peculiar statutes is conclusive, and I would not question its correctness. But in that case no question was raised as to "appropriation" of the funds of the city. Monaghan's judgment was for some services rendered to the city, or on some contract, payable as all other of the current expenses of the city, out of its general funds in the hands of the treasurer. The money in the treasurer's hands was appropriated to pay just such demands. Monaghan's bill was disputed, and he could not get an order for the amount of his claim. He is compelled to bring suit: he recovers a judgment, and the court decide that the judgment of the court is the highest evidence of the justice of the claim; and that it was the duty of the treasurer to pay the judgment without an order from the mayor or controller. There was no pretence that the treasurer had not sufficient funds of the city in his hands unappropriated to any other special purpose. In fact, so far as any "appropriation" existed, it was to pay just such demands as that sued for; and the judgment of the court was justly considered to be the first appropriation of so much of the general fund as was necessary to satisfy the demand; consequently it was entitled to be paid out of any money in the treasury, and the first that should be received in it, without any further order of the officers of the corporation. An answer of the treasurer that such money was necessary for more important purposes, and to support the government of the city in the exercise of its functions, could be no objection to the appropriation made by the judgment of the court. By the theory of that case, the treasurer had sufficient funds in his hands to pay all the demands, and the only question

was whether the judgment of the court was not itself a specific appropriation of that amount to that purpose. There was no default in the city councils; they had furnished means; the only difficulty was in the treasurer's refusal to pay.

The case before us has no resemblance to that of Monaghan. Here the treasurer has no "unappropriated funds" in his hands, nor any appropriated to the payment of these demands. The judgment of the court is not an appropriation of that which was appropriated beforehand, by virtue of the statute, or acts of councils. It is clear that the special funds ordered by statutes to be paid into the sinking fund were "appropriated," and could not by any act of the court be "assigned and appropriated" to a different purpose. Nor can I make any definition of those terms which would not also apply to the appropriations made for other purposes. The writ authorized by the statute does not make a new appropriation of funds in the hands of the treasurer, at the expense of others, but affects only such as are unappropriated to other special purposes. It was properly decided in the case of Pollock v. Lawrence County, *supra*, 137, that the estimate of the commissioners, as to the funds need for the coming year, whether right or wrong, was not an "appropriation" of them to pay any particular debt due by the county, consequently the judgment of the court was the first appropriation, and should have precedence.

The definition there given of the term "appropriation," "to set apart or vote a particular sum of money for a particular purpose," as given by the learned judge, is undoubtedly correct, and according to it the answer of the treasurer is true, not only in its assertion of facts, but in its inference of the law. The funds committed to his care were appropriated and set apart for certain special objects, and consequently he had no unappropriated fund with which to satisfy the exigency of the process served on him, nor could he, under existing circumstances, have any. If the assessments are increased by order of the councils to an amount sufficient to pay their debts, being of the same order as the old debts, and the treasurer should have funds from taxes in his hands, and would not apply them to the judgments, the writ might then interfere to compel him to appropriate the money as

it came to his hands to their payment. If the town council in pretended obedience to the orders either of their own Supreme Court or of this court, pursue the plan of the commissioners, to baffle the collection of those claims by the ingenious contrivance of two separate assessments, one to be paid and one not to be paid; or, by anticipating the funds before they reach the treasury by orders, or posterior appropriations, such conduct may be treated a contempt of court, and the treasurer possibly made a party. But as the case stands at present, the treasurer is not in contempt, because the writs issued by this court have been improvidently issued and must be set aside. Under the circumstances disclosed in this case it is clear that the process should have issued to the city councils, as the legislative power, and the mayor and controller, the proper executive officers, whose duty it was to "cause the money to be paid," and who only had the power. If after a due performance of their several duties, the treasurer, who is their officer or servant, should refuse to perform any duty imposed on him, or attempt by ingenious devices, to evade the performance of it, he may be treated as for a contempt, by serving the proper process upon him for that purpose.

Let the rule be discharged and the several writs set aside.

See Commonwealth ex rel. Penitentiary v. Floyd, *supra*, 342; Larimer v. Pitt Township, *supra*, 353; Loute v. Allegheny County, *infra*, 411; Commonwealth ex rel. Mitchell v. The Commissioners, *infra*, 417; Commonwealth ex rel. Ooon v. Floyd, *infra*, 422.

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*In the United States Circuit Court for the Western District of Pennsylvania.*

LOUTE v. ALLEGHENY COUNTY.

(Vol. X., p. 241. 1863.)

1. Upon service of a mandamus execution upon county commissioners as prescribed by the Act of Assembly of Pennsylvania, of the 16th April, 1834, it is their duty

a. If there be any money in the treasurer's hands unappropriated by previous orders, to cause it to be paid to the party.

- b. If there be not money enough in the treasury to satisfy the whole judgment, to pay it out of the first money received.
- c. If the taxes of the current year are insufficient to pay the judgments and other expenses of the county, to assess and collect on the next year a sufficient sum for this purpose.
- 2. The judgment of the court is an appropriation of all the money in the treasury not already drawn or appropriated by previous county orders in payment of previous demands audited and allowed by the controller; and also of the first money thereafter received for the use of the county.
- 3. The commissioners will be held guilty of contempt should they seek to evade the process of the court by dividing the funds to be collected by taxes and appropriating them before their collection.
- 4. After service of the mandamus execution, the treasurer has no authority to receive county orders of a subsequent date in payment of taxes.
- 5. The provision of the Act of 1st of January, 1862, requiring the treasurer of Allegheny county to receive warrants in payment of taxes, was not intended to repeal any of the provisions of the Act of April, 1834, nor can it relieve the treasurer from the proper application of the county funds in the order of their appropriation as previously made.
- 6. It can have no retroactive effect; nor can the legislature be presumed to intend to aid public officers in an astute scheme to evade the performance of their official duties.

RULE for attachments for contempt against the county officers. The facts are set out in the opinion of the court and the statement which follows it.

*Hamilton and Acheson* for plaintiff.

*R. B. Carnahan, S. H. Geyer, and J. P. Penney* for the county officers.

Opinion filed December, 1862, by

GRIER, J.—The plaintiff and numerous other suitors in this court obtained their several judgments against the county of Allegheny, to November Term, 1861, on interest coupons of the bonds of the county issued for railroad purposes.

Mandamus executions, as authorized by the statute of Pennsylvania, were served on the several officers who represent the county in its corporate capacity, to wit: the commissioners, the controller and the treasurer, on the 19th of November, 1861.

The act authorizing the process provides that "it shall be lawful for the court in which such judgment may be obtained to

issue thereon a writ commanding the commissioners of the county to cause the amount thereof, with the interest and costs, to be paid to the party entitled to such judgment, out of any moneys unappropriated of such county, or, if there be no such moneys, out of the first moneys that shall be received for the use of such county, and to enforce obedience to such writ by attachment."

The duty of the commissioners, on whom process under this act is served, is plainly set forth.

1. If there be any money in the treasurer's hands unappropriated by previous orders, the exigencies of this writ require that the commissioners cause it to be paid to the party.

2. If there be not money enough in the treasury to satisfy the whole judgment, it is their duty to pay it out of the first money received.

3. If the taxes of the current year are insufficient to pay the judgments and other expenses of the county, it is their duty to assess and collect on the next year a sufficient sum for this purpose.

4. The judgment of the court is an appropriation of all the money in the treasury, not already drawn or appropriated by previous county orders in payment of previous demands audited and allowed by the controller; and also of the first money thereafter received for the use of the county.

Have the commissioners complied with the exigency of these writs? If they have not, they are guilty of a contempt of the process of the court.

1. It is admitted that they have not paid the judgments, or any part of them, according to the command of the writs.

2. They have issued orders for large sums since the service of these writs, and appropriated the money collected by taxation to other purposes, posterior in order to the appropriation made by law and the judgment of the court.

3. It is clearly shown by the answers of these officers that instead of seeking to make the appropriation required by the exigency of this process, they have been astute in contriving "how not to do it."

Instead of pursuing the straight line of duty required by the law, of including these judgments in the estimates for the next



year, and assessing a general tax sufficient to discharge these and all expected demands for county purposes, they have pursued the following plan: they divide the liabilities past and prospective for the coming year, into two classes, and attempt to make a prospective appropriation of the moneys to be collected from taxes, which will exclude the precedent appropriation made by law. To effect this plan, they make an estimate of the expenses of the coming year, including the interest on the funded debt intended to be paid, and lay a tax of five mills for this purpose, which is collected and paid in the usual way. Besides this they assess another tax of twenty-seven mills, which is appropriated to pay the debt on the railroad bonds,—one tax intended to be collected and another not intended to be collected. Such intention is justly inferred, because it is the necessary consequence of this new scheme of dividing the funds to be collected by taxes and appropriating them before their collection. The law has appropriated the first money that shall come into the treasury to the payment of these judgments. The commissioners by this scheme have nullified the law and set it at defiance. They have paid out large sums on orders dated since the service of the writs in these cases.

The Act of Assembly of May 1, 1861 (No. 424), relating to Allegheny county, provides for the appointment of a controller and defines his duties. Among others, "he shall, on or before the 1st day of February, annually, communicate to the commissioners, in writing, a detailed estimate of the receipts and expenditures for the legitimate purposes of the county for the current year, including interest due and to fall due on all lawful debts of the county bearing interest, and the commissioners shall, before the 15th day of February thereafter, fix such rate of taxation upon the valuation of the taxable property of the county as will raise a sum sufficient to meet said expenditures."

Here we have the duties of the respective officers clearly stated. The controller was bound to include these judgments among the necessary expenditures. The commissioners were bound to assess a tax sufficient to pay them all. They have no authority to levy and assess two separate and distinct taxes, or "appropriate" any specific portion to be paid out in preference.

to another. The taxes have no ear-mark; the five mills and the twenty-seven mills cannot be thus separated and distinguished; the taxes assessed form the one general fund, when collected, in the hands of the treasurer, in the order that the drafts are presented to him.

After the service of this process, the treasurer had no authority to receive county orders of a subsequent date in payment of taxes, and thus divert the funds of the county from the appropriation of them made by law. His countenancing and assisting in a scheme to evade the exigency of these writs, by the formation of an association to misappropriate the funds of the county and hinder them from coming into the treasury, is a disregard of his plain duty and contempt of the process of the court. Whether the provision of the Act (No. 1) of January, 1862, requiring the treasurer to receive warrants in payment of taxes, was intended to assist this scheme, concocted and carried into practice by these officers, it is unnecessary to inquire. It is a convenient practice, everywhere followed without any legislative authority, but neither the custom nor the law can justify this abuse of it, in order to evade compliance with a legal duty. It is enough to say that this provision was not intended to repeal any of the provisions of the Act of 1834, nor can it relieve the treasurer from the proper application of the county funds in the order of their appropriation, as previously made. The provision of the act was wholly superfluous where it could be obeyed without injury or wrong to third persons, and the court will not construe it as authorizing officers to evade the performance of their duties and disregard the process of the court. There are many instances in which legislation is obtained, apparently just, which the originators expect to use in a way never contemplated by the legislature. It can have no retroactive effect upon the rights of parties now before the court. Nor could the legislature be presumed to intend by it to aid public officers in an astute scheme to evade the performance of their official duties.

The commissioners have sent in a statement, accounting for the fact that while the five mill tax, appropriated by them to pay other debts and liabilities of the county, was collected without difficulty, only \$900 out of an assessment of over \$700,000

could be raised to apply to the payment of the railroad coupons. They admit that the proper estimates were sent to them by the controller, but offer no reason at all for dividing the assessment into two distinct portions—one of five, the other of twenty-seven mills—or why this scheme of separate duplicates was now for the first time devised, or if there were to be separate and several funds in the treasury, and a special tax assessed and appropriated to pay each distinct object of appropriation, why they were not twenty instead of two.

The reasons given for not collecting the twenty-seven mill tax were, that it would cost over \$100 to make out the duplicates, and they had to advertise for contracts to do it. That the contractors made great delay, furnished their work in instalments, full of mistakes, which took much time to correct, &c., &c. They deny having entered into any scheme to evade compliance with the exigency of the writ, yet confess to a course of proceeding whose only object could be and was to render the process of this court of no effect. In this course of proceeding the treasurer was clearly in collusion. But I do not see any particular act of the controller, which his duty required, that he has failed to perform. He denies any collusion with the association got up to assist the public officers in the plan contrived not to do what the law imposed on them as a duty.

For the present I am willing to accept these excuses, lame as they are, for the past negligence (to use a mild term) of these officers, and to test their sincerity. When this case was argued nine months had passed, and but \$900 had been raised, which the commissioners contended was applicable to these judgments. I said to them then, I will suspend acting on these motions till January next. If it be true that you are acting in good faith, you shall have time to collect the tax assessed, as you say, for this purpose. If you have not divided these assessments for the purpose charged, you can demonstrate your assertions by your acts.

A more painful duty has seldom been demanded of the court than that which we are now called on to perform. But we cannot evade it, or find a contrivance to not do it, except for a certain time. We shall, therefore, postpone the public decision

of this matter till next May Term. If, in the meantime, the commissioners and treasurer shall have collected the moneys to satisfy these judgments, the rules will be discharged. This will give ample time to the defendants, and if by that time the money be not paid, or some arrangement be made with the creditors, the court will be compelled to consider it as the settled purpose of these officers to treat the process of the court with contempt, and must act accordingly.

See Commonwealth ex rel. Penitentiary v. Floyd, *supra*, 342; Larimer v. Pitt Township, *supra*, 353; Evans v. Pittsburgh, *supra*, 405; Commonwealth ex rel. Mitchell v. The Commissioners, *infra*, 417; Commonwealth ex rel. Coon v. Floyd, *infra*, 422.

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*In the District Court of Allegheny County.*

COMMONWEALTH EX REL. MITCHELL v. THE COMMISSIONERS OF  
ALLEGHENY COUNTY.

(Vol. X., p. 257. 1863.)

1. The court will not grant a mandamus to compel the county commissioners to draw orders on the treasury, where the unqualified answer of the commissioners remains uncontradicted, that there are no unappropriated funds in the treasury.
2. Whether mandatory executions, on writs of special *feri facias* of the United States Circuit Court, are an appropriation of all the moneys coming into the treasury of the county, after the service of said writs, until the same are fully paid and satisfied; or whether they only appropriate and bind the excess of said moneys not absolutely needed and required to defray the ordinary and current expenses of the county, not decided.

THE case is sufficiently stated in the opinion of the court.

*Forward* and *Woods*, for the relator.

*Carnahan*, for the county commissioners.

The opinion of the court was delivered February, 1863, by  
WILLIAMS, A. J.—This is a rule to show cause why a mandamus should not issue to the county commissioners, commanding them to draw a warrant on the treasurer of the county, in favor

of the petitioner, Daniel E. Mitchell, for the sum of twelve dollars, due him for services as crier in this court.

The commissioners in their return to this rule, do not controvert the justness of the petitioner's claim ; on the contrary they admit the liability of the county to pay the same, and their duty to draw warrants for the payment of the debts due by the county, but they show for cause, in substance, the following matters :

1. There are no funds in the treasury of the county unappropriated, and there were none such at the time of granting the rule and making application for a warrant.

2. Judgments had been obtained in the Circuit Court of the United States for the Western District of Pennsylvania, and mandatory executions issued thereon against the county, on which there is still due the sum of \$127,436 49, and for which warrants had been drawn on the treasurer of the county and delivered to the plaintiffs in said judgments and mandatory executions prior to the petitioner's application for a warrant ; and as said commissioners are advised, the law has appropriated all the money which shall come into the treasury to the payment of said judgments and mandatory executions until the same are fully paid and satisfied ; and to draw a warrant in favor of the petitioner would be an appropriation of money in his favor in derogation of the rights of the mandatory execution creditors, and in contempt of the judgment and process of the Circuit Court of the United States, which has appropriated all the money which shall come into the treasury of the county, until said mandatory executions are fully paid and satisfied.

The answer of the commissioners, verified, as it is, by affidavit and uncontradicted by the petitioner, must be taken to be true in considering the question which arises in this case. What then is the duty of the commissioners under the facts disclosed in the answer ? They admit it to be their duty, as a general rule, to draw warrants on the treasury for all debts of the county, but they insist that it is not their duty to draw such warrants when there are no unappropriated funds in the treasury. What then is their duty in this respect, and will the court compel them by *mandamus* to draw orders on the treasurer when there are no funds in the treasury of the county applicable to their payment ?

In the case of *The Commonwealth ex rel. Witmer v. The Commissioners of Lancaster County*, 6 Binn. 5, it is said that the court will not grant a mandamus to the county commissioners to draw an order upon the treasurer, if there is no money in the treasury to pay it. There, a rule had been obtained on the commissioners of the county of Lancaster, to show cause why a *mandamus* should not issue against them to compel them to make an order on the treasurer of said county, in favor of Witmer for \$58,444 44, the amount awarded by commissioners in pursuance of an Act of Assembly, as the valuation of his stone bridge over the river Conestoga. The commissioners showed for cause, among other matters that the treasurer had not in his hands any sum of counted money equal to the sum for which the order was prayed. In the opinion delivered by Tilghman, C. J., it is said: "We are called on to issue a mandamus, to compel the commissioners of Lancaster county to draw an order on the treasury for the sum of \$58,444 44. The commissioners say they ought not to draw the order because there is not money in the treasury sufficient to answer it. No doubt they speak the truth, and it appears to be cause insurmountable against issuing the writ. Whether the commissioners have done wrong in not taking measures to have the money placed in the treasury, is not now the question. If they have, we have no right to punish them in this way. What would it signify to draw an order on an empty treasury? The treasurer would refuse payment, and there the matter would end."

So, also, in the case of *The Commonwealth ex rel. Price and Roberts v. The Commissioners of Philadelphia County*, 1 Whart. 1, a mandamus to the commissioners of said county was refused, where it appeared, by the return to a rule to show cause, that there was no money in the county treasury applicable to the purpose. And in *The Commonwealth v. Commissioners of same county*, 2 Whart. 286, it is declared that a mandamus will not be granted to county commissioners to draw orders on the county treasury, unless there is money in the county treasury applicable to such orders. In delivering the opinion of the court, Sergeant, J., said: "The return by the defendants on oath, that there is not, at this time, in the county treasury, nor was there at the time of the application of these relators, any funds appli-

cable to such orders, the whole balance in the treasury being demanded for current expenses, and otherwise specifically appropriated, is a sufficient answer to the request for a present mandamus to the defendants to pay the amount of these claims. This principle was decided very recently in the case of *The Commonwealth ex. rel. v. The County Commissioners*, 1 Whart. 1; and the reasons for it are obvious. The county commissioners are the officers elected by the people, under the laws, to superintend the finances of the county. They authorize all its expenditures, and are responsible for the faithful and prudent management of the concerns of the county in that respect. If the funds under their control, raised by directions of the county board, in whom the authority is vested by law, are not sufficient to meet the claims against the treasury, how are they to pay them? It was decided long since in *Commonwealth ex. rel. Witmer v. The Commissioners of Lancaster County*, that they ought not to draw orders on an empty treasury, and where the demands exceed the funds it is an empty treasury as to some of them. Under these circumstances the county commissioners must exercise a sound and just discretion in reserving money to defray the current expenses of the county; because they are of the first importance to the welfare of the public and they are precluded by law from expending moneys specifically appropriated, otherwise than for their specified objects. This court would not interfere with the exercise of a discretion so plainly proper and necessary."

It is true that in none of the cases cited was the mandamus applied for to compel the commissioners to draw orders on the treasurer for the payment of the ordinary and current expenses of the county, and in this respect they may be distinguished from the present. But in all of them the principle is recognised and affirmed that the court will not grant a mandamus to compel the commissioners of a county to draw orders on the treasury unless there are funds in the treasury applicable to such orders. This view of the law renders it unnecessary to consider the question presented by the remaining allegations of the respondent's answer. If it appeared that there were funds in the treasury not otherwise appropriated than by the judgments and mandatory executions referred to, then the question would be directly and

fairly presented, whether the said mandatory executions, or writs of special *feri facias* of the Circuit Court of the United States, are an appropriation of all the moneys coming into the treasury of the county, after the service of said writs, until the same are fully paid and satisfied ; or whether they only appropriate and bind the excess of said moneys not absolutely needed and required to defray the ordinary and current expenses of the county. When this question arises, it will demand the gravest consideration of the court. Its decision will not concern the petitioner alone, but each and every citizen of the county ; for, if decided against the petitioner, in a case like the present, it might possibly stop the wheels of the county government, and shut up all the courts exercising civil and criminal jurisdiction in the county, for want of the necessary funds to keep their machinery in motion. But the question does not necessarily arise here. The answer alleges, without qualification or explanation, that there are no unappropriated funds in the treasury. The allegation that the law has appropriated all the moneys which shall come into the treasury of the county to the payment of the mandatory executions referred to, was not intended, as we understand it, to qualify the allegation that there are no unappropriated funds in the treasury of the county, but was intended to be an independent averment of the facts stated therein as an additional reason why the mandamus prayed for should not be granted. But it is possible that such was not the understanding and intention of the commissioners, and if the petitioner is advised, and believes, that he can make it appear that there were funds in the treasury of the county not otherwise appropriated than by said mandatory executions at the time application was made for the warrant, the rule will be made absolute without prejudice, and an alternative mandamus awarded. Otherwise the rule will be discharged. It would be useless to issue an alternative mandamus if all the funds in the treasury had been appropriated by previous warrants or orders, as the court would be compelled under the authorities cited, to refuse a peremptory mandamus.

Commonwealth ex rel. Penitentiary v. Floyd, *supra*, 342 ; Larimer v. Pitt Township, *supra*, 353 ; Evans v. Pittsburgh, *supra*, 435 ; Louie v. Allegheny County, *supra*, 411 ; Commonwealth ex rel. Coon v. Floyd, *infra*, 422.



*In the Common Pleas of Allegheny County.*COMMONWEALTH EX REL. COON v. FLOYD, TREASURER OF  
ALLEGHENY COUNTY.

(Vol. X., p. 273. 1863.)

1. Writs of execution issued by the United States Circuit Court, under the 6th section of the Act of 15th April, 1834 (adopted as a rule of practice in said court) and served upon the treasurer of Allegheny county neither bind the money of the county in his hands, nor restrain him from paying it out to any person demanding the same on a proper warrant.
2. The only mode of paying demands against a county is by warrants drawn by the commissioners on the treasurer.
3. Only unappropriated moneys of the county should be applied by the commissioners to the payment of judgments or executions.
4. The annual estimate by the commissioners, of the probable expenses of the county for the ensuing year, is an appropriation of the money which may be collected, for the specific purpose for which it was levied and collected.
5. Mandamus is the proper remedy against a county treasurer, when he improperly refuses to pay warrants drawn on him by the commissioners.

RULE for mandamus.

*S. H. Geyer*, for the relator.*John P. Penney*, for the respondent.

The facts are set out in the opinion of the court, which was delivered February 14, 1863, by

STOWE, A. J.—David R. Coon, on the 25th of October, 1862, filed his petition in the Court of Common Pleas, setting forth: That he had been summoned by the sheriff of the county to attend the Court of Common Pleas as a juror on the first Monday of May, 1862; that in pursuance thereof he attended as a juror in said court for the space of twelve days, and that in accordance with the tenth section of the Act of Assembly of 1861, entitled "An act relating to Allegheny county," his fees as such juror were ascertained to be \$12 62; which was duly certified by the clerk of courts to the commissioners, after having been duly sworn to before the controller; that on the 20th of May, 1862, two of the commissioners issued their warrant, directed to

the treasurer of the county, directing him to pay to petitioner or bearer, for his fees as juror, \$12 62, or credit the same on any debts due by said petitioner to the county, which warrant was countersigned by Henry Lambert, controller.

That on the 8th October, 1862, petitioner presented said warrant to the treasurer for payment, and was refused the money, although there was more than sufficient money in the treasury to pay the same, the treasurer alleging that special *fi. fa.*'s had been issued by the Circuit Court of the United States for the Western District of Pennsylvania, on judgments obtained against Allegheny county on certain bonds given to railroad companies by the county. Petitioner then prayed a rule on the treasurer to show cause why a mandamus should not issue to compel him to pay the said warrant for juror's fees.

The same day a rule was granted as prayed for, returnable on the 15th of November, 1862, at which time an argument was heard, and upon consideration, notice was ordered to be given to the creditors whose writs of *fi. fa.* had been served on the treasurer, or their attorneys, of the application for the mandamus, that they might show cause, if any they had, why the same should not be issued as prayed for.

Notice was then served as directed and received by the attorneys for the several parties, under protest, but not one of them appeared to intervene or show cause against the application.

The treasurer filed his answer, admitting the allegations in the petition, and stating as his reason for not paying the warrant, "That attachments had previously been issued out of the Circuit Court of the United States for the Western District of Pennsylvania, and served on him, which were in the nature of special *fi. fa.*'s, and commanded him to pay out of any moneys of the county unappropriated in his hands, large sums of money; in fact much more than the whole amount of moneys received by him, or in his hands since the service of said writs: that said writs were issued against the county for interest due on railroad bonds given by the county: that a special tax had been levied but very little paid in as yet, not nearly sufficient to pay the executions, and that it is claimed said writs are entitled to pre-

cedence and must be paid out of the moneys in the hands of the treasurer."

The petition and answer raise the question whether all the money in the hands of the treasurer must be held for the executions of attaching creditors, under the exigency of the writs; whether the fees of jurors should be paid, notwithstanding the writs of *fi. fa.*, and the fact that there is not sufficient money in the treasury to pay them alone; much less, both them and the warrant held by petitioner.

The various writs of execution specified in the answer of the treasurer of the county, were issued by the Circuit Court of the United States for the Western District of Pennsylvania (by virtue of a rule of that court), under the 6th section of the Act of 15th of April, 1834, Pamph. L. 538, which is as follows:

"If a judgment shall be obtained against a county in any action or proceeding, the party entitled to the benefit of such judgment may have execution thereof, as follows, and not otherwise, viz.: It shall be lawful for the court in which such judgment shall be obtained, to issue a writ commanding the commissioners of the county to cause the amount thereof, with interest and costs, to be paid to the party entitled to the benefit of judgment out of any moneys unappropriated of such county; or, if there be no such moneys, out of the first moneys that shall be received for the use of the county, and to enforce obedience to such writ by attachment."

This act was evidently intended to reduce to a certainty the doubts which existed as to the corporate character of a county, and to establish a uniform practice in reference to actions in which it might be a party, and introducing a new process of execution, and with others passed at the same session of the legislature, forms a complete system of county government.

Prior to the act it was settled that no corporate property could be sold on an execution against the county, and the proper and usual (perhaps only) remedy was for a party who had a claim, or had obtained a judgment against the county, to apply to court for a mandamus to compel the commissioners to draw their order on the treasurer for the amount: 4 S. & R. 443, in which case as such a writ was discretionary in the court, if they deemed the

case a proper one for their interference, they would grant it, but even then, if there was no money in the treasury applicable to the claim, the treasurer would refuse to pay, and the creditor would be in no better condition than before: *Price v. County Commissioners*, 1 Whart. 3; *Commonwealth v. Commissioners of Lancaster County*, 6 Binn. 5.

This act, however, has changed the manner of proceeding where a judgment has been obtained, and gives, as a matter of right, in such case, a mandatory writ of execution, directed to the commissioners, requiring them to cause the judgment and costs to be paid, &c., as already mentioned, and making it their duty, under pain of attachment, to make provision for the payment of the claim.

If they draw their warrant on the treasurer and deliver it to the creditor, entitled to the benefit of the judgment, or his attorney or agent, he may then make demand of the treasurer for payment, but till such warrant issues, the treasurer is not bound, nor has he the legal right to pay to the creditor one cent of the money belonging to the county.

Knox, J., in *Luzerne County v. Day*, 11 Harris 141, says: "The financial interests of a county are under the supervision and control of the county commissioners, who are required to pay all legal demands against the county by warrants, drawn by them on the county treasurer. This is the only mode of payment known to the law."

No Act of Assembly provides for the service of the writs of execution, to be issued on judgments against counties, upon the treasurer; but, on the contrary, the act cited requires the execution to be issued to the commissioners, and not otherwise, and therefore the writs mentioned in the treasurer's answer, as having been served upon him have no legal or binding effect whatever, and in no wise restrain him from paying out the money of the county in his hands, to such persons as may demand payment of any legal warrant or order directed by the commissioners to him.

The only semblance of legal authority for such a proceeding, emanating from any of the courts in Pennsylvania, seems to be the case of *Monaghan v. The City of Philadelphia*, 4 Casey 207, where Justice Knox, in a case which simply raised the question

of the regularity of an ordinary writ of *ieri facias* in a judgment against the city, and whether or not it should be set aside, says: That an execution against the city of Philadelphia should be issued to the city treasurer, and gives as the reason, that there are no commissioners to whom to issue it.

Even assuming such to be a correct construction and application of the statute, it does not touch the question raised here, and the answer of the treasurer, setting up the service of the various writs of execution issued by the United States Court upon him as a reason for not paying the warrant held by the relator, shows no legal cause for so doing.

This disposes of the only matter discussed in the argument, but the public interests seem to require an examination of the main question involved in the controversy between the county and her judgment creditors, to wit: Whether the commissioners are legally bound to apply the moneys of the county in the treasury, levied and collected for ordinary county purposes—not including debts for which judgments have been obtained and executions issued—to the payment of those debts. The act already referred to provides that the commissioners “shall cause the judgments, &c., to be paid out of any moneys unappropriated of the county, or if there be no such moneys, out of the first moneys that shall be received for the use of the county.” The phraseology of the latter part of the preceding sentence is somewhat ambiguous, but will fairly and naturally bear the construction of “first unappropriated moneys,” and it is palpable that the reasons which induced the legislature to exempt money appropriated in the hands of the treasurer at the time of the service of the writ on the commissioners, apply with equal force to appropriated moneys, which may be paid into the treasury the next day or the next hour. The obvious intent was not to allow moneys appropriated to a specific purpose to be diverted to pay judgments or executions. This becomes still more apparent upon the examination of the Act of 15th April, 1834, which is “*pari materia*” with the former and makes it an entire system of county government. It provides “That the commissioners shall, at their first annual meeting after the general election every year, proceed to make an estimate of the probable expense

of the county for the ensuing year" for the purpose of providing for its payment by the levy of taxes.

This involved the examination of the sums necessary for the several purposes for which money was to be raised, such as expenses of jurors, officers of the court, jail, poor, &c., &c.; and an estimate for each precisely in the same manner as is done by the legislature in the appropriation for the expenses of the state government, and after which it was evidently framed.

This estimate fixed the amounts and purposes for which money was to be raised and was "*ipso facto*," an appropriation of it when it should be received by the county, to the purposes designated. But what was left to inference and construction by the Act of 1834, was specifically enacted by the Act of 16th May, 1857. The first section of that act provides, "when any moneys shall have been or may hereafter be collected by law in any city, county or township, for any special purpose, and paid into the hands of the treasurer of such city, county or township, it shall be unlawful for such treasurer to apply such moneys, or any part thereof, to any other purpose than that for which such moneys shall have been collected, and every such misapplication shall be held and deemed to be a misdemeanor, &c."

It is certainly not very reasonable to suppose that a statute will be so construed as to give a court a right to compel the treasurer to do that, which if he did, would be a direct violation of his declared duty, and subject him to fine and imprisonment. Yet to such conclusion would the doctrine contended for by those who demand the moneys in the treasury on their writs of execution drive us.

On the other hand, the view taken by this court renders the whole method of proceeding to recover the amounts of judgments against the county, simple and clear. Each year the commissioners are bound, under the acts mentioned, to make an estimate of all the probable expenses of the county for the ensuing year, and it is their duty to include in their calculations all the debts they know to be due, or that will become due, during the year and such as they deem probable. When the estimate is made, it is their duty to levy and have collected sufficient moneys to pay them all, and to apply or to see to the application to each subject matter of in-

debtedness or expense, the moneys collected for that purpose and none other, except where an unprovided for execution comes upon the county, the commissioners are to apply to its payment whatever surplus moneys may remain in the treasury after paying all that was needed for the several objects and purposes for which estimates and appropriations had been made, and then make provision in the next annual estimate and appropriations for whatever may be necessary to satisfy the judgment, and levy and collect sufficient money to pay it.

This would secure the payment of every judgment in two years, without interfering with the funds necessary to carry on the affairs of the county.

Even if this construction of the act referred to were doubtful, the Acts of 1st May, 1861 and 8th April, 1862, relating to Allegheny county, would of themselves relieve from all difficulty on the subject.

By the 6th section of the Act of May, 1861, it becomes the duty of the controller on or before the 1st day of February, "annually to communicate to the commissioners, in writing, a detailed estimate of the receipts and expenditures for the legitimate purposes of the county for the current year, including interest due and to fall due on all lawful debts of the county bearing interest, and the commissioners shall not, by contract or otherwise, increase the expenses of the county, in any one year, to an amount beyond the taxes assessed as aforesaid for said year."

If we construe the word "expenses" in its natural sense of laying out or disbursement of money, as well as incurring liability, we have in this act a positive prohibition of paying money out of the treasury and incurring liability in any way to a greater amount than the estimate and assessment for the year, and also, by strong implication, a prohibition of the payment of money to any object, except one for which it had been levied and collected, and the doing of which was, as we have already seen, made a penal offence by the Act of the 16th May, 1857.

The Act of the 8th April, 1862, again affirms this view, and directs that the controller's estimate under the Act of 1st May, 1861, when approved by the commissioners and they shall have fixed the rate of taxation sufficient to meet the expenditure

“shall remain and stand as appropriations, and no transfer shall be made, unless in case of absolute necessity, and by the consent of the controller and commissioners, in writing, filed of record.”

As already stated, the various Acts of Assembly, taken together, give a complete system, in which, in this county, as now arranged, it would be very hard to point out any very serious defect, so far as the management and control of our county expenditures and its general fiscal operations are concerned.

While this construction makes ample provision for the payment of all legitimate claims against the county within a reasonable time, it at the same time, prevents any money being paid out until a proper warrant is drawn by the commissioners on the treasurer for that purpose, and also the application of the moneys in the treasury to any other objects than those included in the detailed estimate, or in other amounts than as specified in the same, except in the case of a transfer by the controller and commissioners, as provided by the Act of 1862, when an absolute necessity, of which they are the sole judges, may arise.

I am, therefore, of opinion that neither the commissioners nor the commissioners and controller are bound, even when an execution, under the Act of 1834, has been regularly served on them, to cause the same to be paid out of the moneys of the county, until the amount of it has been included in the estimates and appropriations provided for by the Acts of Assembly, and money for the specific purpose has been duly collected, except only where there should happen to be a surplus in the treasury, after paying the various appropriations for the year.

As the decisions of the state courts and those of the Circuit Court for the Western District of Pennsylvania, upon the main questions discussed in this case, have been at variance, and in some respects directly opposed, I have thought best to examine these questions solely upon the Acts of Assembly themselves, and to form my opinion from the clear intent of them alone, *ex viceribus suis*, without referring to the views heretofore expressed by any judge, or even to the public policy and necessity which (were the case a doubtful one they would force me to the same conclusion) would constrain courts of justice to construe the statutes so as, without doing violence to their plain language and



meaning, to best advance the general welfare and protect the rights of the people, rather than to so interpret them as to entirely destroy our local government and subvert the purposes for which it was established.

Although not mentioned upon the argument in the case, it has been suggested that admitting the answer of the treasurer shows no good cause for his refusal to pay the warrant in question, still the relator has no right to the remedy prayed for; that he has a specific right, and also a specific legal remedy, and that he must therefore pursue that legal remedy. If he has a clear and sufficient remedy at law, the objection is well taken: *Commonwealth v. Rosseter*, 2 Binn. 262; *Commonwealth v. Canal Commissioners*, 2 Penna. R. 518; *Drexel v. Man*, 6 W. & S. 386.

But according to the views already expressed, the relator is without any available remedy at law, and a suit and judgment against the county, with writs of execution under the Act of 1834, would put him in no better position than he now is. The treasurer is bound to pay the order of the commissioners on him, if he has the money, raised for that purpose, to pay it with, and if he refuses, the only remedy is mandamus.

Judge MELLON concurred verbally in the foregoing opinion.

The following opinion in the same case, concurring also in substance with Judge Stowe, was, on the 23d of February, filed by

STERBETT, P. J.—This is a rule on the county treasurer, to show cause why a mandamus should not be issued to enforce the payment of a warrant, dated May 20, 1862, drawn by the commissioners and countersigned by the controller, in favor of the relator, for his daily pay and mileage as a juror in this court at the last March Term.

There is no question as to the validity of the warrant. It was presented to the treasurer, on the 8th of October last, and payment refused for the reason set forth in his answer, viz.: "Because attachments had previously been issued out of the Circuit Court of the United States for the Western District of Pennsylvania, and served upon him, which writs were in the nature of special *fi. fa.*'s, and commanded the respondent to pay out of any

moneys of the county unappropriated, large sums of money—much more than the whole amount of money received by him or in his hands since the service of said writs. That the said writs were issued upon judgments, obtained against the county of Allegheny, for interest due upon bonds, issued by said county to sundry railroad companies. That a special tax has been levied by the proper authorities for the payment of all interest due upon said bonds, but a very small sum has yet been paid to this respondent on account of said tax, and not near sufficient to pay the amount of said writs; and it is claimed that the said writs are entitled in law to precedence, and must be paid out of the moneys in hands of your respondent, before the warrant aforesaid can be legally paid by him, although the said moneys have been levied and collected for the general purposes of the county. The respondent for these reasons has declined to pay said warrant," &c.

On the argument of the rule, no question was made as to whether the writ of mandamus will lie in such a case as the present. For reasons, which we will not now take time to present fully, we are of opinion that it does. The general rule of law is that a specific legal right must be established, as well as the want of a specific legal remedy. The writ is always refused where the party has another complete remedy, unless, as it is said in some cases, the remedy is extremely tedious. In the present case we think a clear legal right is shown, as well as the want of an adequate remedy. The relator may sue and obtain judgment against the county, and then proceed against the commissioners in the manner prescribed by the Act of 1834, but this process, as we shall presently notice, would not reach the treasurer. The commissioners may exhaust their power in endeavoring to obey the writ—they may cause the necessary funds to be collected and deposited in the treasury, and draw their warrant on the treasurer for the amount of the judgments and costs, yet, still the treasurer, as he does now, may refuse to pay the same.

The Act of April 14, 1834, section 137, provides that "every person who shall serve or attend as a juror, in any court, shall be entitled to receive from the treasurer of the county, upon a warrant drawn by the commissioners thereof, one dollar for each

and every day's service or attendance as aforesaid; and the Act of April 15, 1834, makes it the duty of the treasurer to pay warrants drawn by the commissioners. If the commissioners have drawn their warrant for the juror's fees, and have provided the funds necessary to pay it, what more can they do? When such a warrant is presented, it is the plain duty of the treasurer to pay it, if the funds for that purpose have been provided. His act in so doing is purely ministerial, and the performance of it, if refused, should be enforced by mandamus. A principle somewhat similar was recognised in *The Commonwealth v. Johnston et al.*, 2 Binn. 275, and also in *Kendall v. United States*, 12 Peters 524.

The question then raised by the petition and answer, is whether the money in the treasurer's hands must be applied to the mandatory writs of the Circuit Court, to the exclusion of the relator's warrant.

The principles involved are similar to those presented in the case of *Commonwealth ex rel. Western State Penitentiary v. Floyd*, decided by this court (*supra*, 342), and a reference to some of the views there expressed would be sufficient for our present purpose, but as the question is one of more than usual importance, we will briefly notice a few of the reasons that have influenced our judgment in this case.

*First.*—The process against the treasurer, under which the judgment creditors are alleged to claim the fund, is without authority of law. There is no law authorizing such process against the county treasurer. The mandatory writs in question were issued under and by virtue of a rule of the Circuit Court, adopting as part of its civil process the sixth and seventh sections of our act in relation to actions by and against counties and townships, approved April 15th, 1834. (Beeson's Court Rules 284.) We must therefore look to the act for the authority claimed. It is not pretended that any other authority exists. What then are provisions of the act thus adopted as part of the civil process of the Circuit Court. It provides that a party entitled to the benefit of a judgment obtained against a county," shall have execution thereof, as follows and not otherwise," viz: "It shall be lawful for the court in which such judgment shall

be obtained, to issue thereon a writ commanding the commissioners of the county to cause the amount thereof with interest and costs, to be paid to the party entitled to the benefit of such judgment out of any moneys unappropriated of such county, and if there be no such moneys, out of the first money that shall be received for the use of said county, and to enforce obedience to such writ by attachment." (Purdon 172.) "The court is authorized to issue a writ commanding the commissioners," not the treasurer, of the county to cause the amount to be paid. The creditor shall have execution of his judgment in the manner specifically pointed out by the act, "and not otherwise." The commissioners of the county are the only persons to whom the act authorizes the mandatory writ to be addressed. So far as any authority is given by the act, it might as well be addressed to the sheriff, or to the president of any of our banks, as to the treasurer. But, it is suggested that the treasurer comes within the spirit of the act, and therefore the writ is well addressed to him—a very common and a very lame apology for what may be appropriately called judicial legislation. Why invoke the spirit of the law in order to justify a writ against the treasurer, when the law itself in very terms declares that you may have the writ against the commissioners, and no one else? When the remedy provided is so specifically pointed out, it is unnecessary to inquire what else may or may not be embraced within its spirit. If the legislature had intended to subject the treasurer to the operation of the writ, they would have said so, and if the act is defective, let the legislature amend it. It is the duty of courts to construe laws, not to make them.

The judiciary and legislative departments have each their appropriate spheres, and the one should not encroach upon the other.

The case of *Monaghan v. The City of Philadelphia*, 4 Casey 207, is not an authority against this construction of the act. The question in that case was whether an ordinary writ of *fiery facias* against the city could be sustained or not. It was held that it could not, and the opinion was expressed that a mandatory writ would be the proper one, but this expression was not intended to apply in the case of a county, for which, as we have already seen, the act makes full and specific provision.

*Second.*—The funds claimed to be held by the writs of the Circuit Court are not “moneys unappropriated of the county,” and therefore not subject to those writs. The 6th section of the Act of May 1, 1861, entitled “An Act relating to Allegheny county,” Pamph. L. 451, requires the controller, on or before the first day of February, annually, to submit to the commissioners in writing, a detailed estimate of the expenditures for the legitimate purposes of the county for the current year, and the commissioners are required to act upon the same within fifteen days thereafter, and levy a tax “sufficient to meet the said expenditures.” The same section prohibits the commissioners from increasing, by contract or otherwise, the expenses of the county beyond the taxes so assessed. In accordance with this provision of the act, the controller, on the first day of February, 1862, laid before the commissioners a detailed estimate of expenditures for the current year, embracing over thirty items, among which are the following, viz :

Expenses of District Court, including jurors,	. \$9,800 00
“ “ Common Pleas, “ “	. 3,500 00
“ “ Quarter Sessions, &c., “ “	. 13,500 00
“ “ Supreme Court, “ “	. 480 00
Road Damages, . . . . .	. 2,500 00

Within the time prescribed, the Commissioners assessed a tax of five mills to meet all these items of expenditure, amounting in all to \$——. They also at the same time assessed a tax of twenty-seven mills to pay interest on railroad bonds, amounting to \$——, as estimated by the controller, and also three mills for state tax. These several assessments were made for the purpose of meeting the different items of expenditure specified in the controller's estimate, that is to say, the assessment of three mills was made for the express purpose of paying the state tax, and for nothing else; the five mills for the express purpose of defraying the ordinary current expenses of the county government, such as expenses of the jail, prisoners in the penitentiary, house of refuge, court expenses, including juror's fees, road damages, building and repairing bridges, &c., &c. It may, therefore, with the strictest propriety be said that the amounts of tax thus assessed

were respectively appropriated to the several objects for which the assessments were made. If this is not an appropriation we are at a loss to know what it should be called. Standard lexicographers tell us that to appropriate is to set apart or vote a sum of money for particular object.

The annual appropriations of the legislature are on the same principle. An estimate of the various receipts and expenditures of the state government is made, the amount required for each item or class of expenditures is fixed, and provision is made to raise and bring into the treasury sufficient revenue to meet the same. The legislature regulates the amount to be expended for various objects during the current year, and provides, by taxation and otherwise, the funds necessary to meet the same. The controller and county commissioners are clothed with similar powers in respect to the county government. The controller estimates and fixes the amount necessary to be expended for each department of the county government, and the commissioners assess and cause to be collected the tax necessary to meet the same. The one is just as much an appropriation as the other.

Again, if any doubt existed on the subject, it is entirely removed by the 9th section of the supplement to the Act of May 1, 1861, which requires that the controller's estimate of annual expenditures, "when approved by the commissioners, shall be classified in detail, under the heads of appropriation for the several departments of the county; and after the commissioners have fixed such rate of taxation upon the taxable property of the county as will raise a sum sufficient to meet said expenditures, then the said estimated amounts shall remain and stand as appropriations, numbered regularly for each of said departments; and no transfer from one appropriation to another shall be made, unless in case of absolute necessity and by consent of the controller and commissioners, in writing, filed as a record." May we not, therefore, safely conclude that the funds in the treasury, assessed and collected for the express purpose of paying jurors and other necessary current expenses, are not "moneys unappropriated of the county," and that, consequently, they are beyond the grasp of the writs in question?

*Third.*—Apart from all other considerations, a sound public policy forbids that the funds necessary to defray the ordinary current expenses of the county, should be withdrawn from the treasury and applied to other purposes. It is by means of the county organization and government that the Commonwealth, in a great measure, exercises her sovereign powers. Her courts and penal institutions are in a very great degree dependent on the county organizations for their efficiency. Her revenues are mainly collected through the agency of the county authorities. In short, the county government enters so largely into, and forms such an essential part of, the state government, that whatever impedes the one, must necessarily embarrass the other.

The public necessity and welfare transcend everything else. All other interests are necessarily subservient. And this is the view that has been uniformly taken by our courts in every case where the question has arisen: 1 Whart. 3; 2 Id. 294. These cases both arose since the Act of 1834. They were both rules for mandamus on the county commissioners to draw warrants on the treasurer. In the first case the commissioners answer, "that there is no money in the treasury except that which is wanted to defray the ordinary and current expenses of the county." The Supreme Court, in deciding that the answer was sufficient, says, "we should probably stop the wheels of government if the mandamus were allowed." In the other case the answer of the commissioners is "that there is no money in the treasury, which is not wanted to defray the ordinary current expenses of the county, and that there is not sufficient even to defray them." Mr. Justice Sergeant, in delivering the opinion of the court, sustaining the answer and refusing the mandamus, says, "the county commissioners must exercise a sound and just discretion in reserving money to defray the current expenses of the county, because they are of the first importance to the welfare of the public." More recently the same principle arose in the District Court of this county: *Larimer v. Pitt Township*, *supra*, 353. In that case a mandamus execution, under the 7th section of the Act of 1834, was issued on a judgment against the township, and the township officers, notwithstanding the writ, continued to apply the funds of the township to the support of

the poor and repairing the roads. An attachment was applied for, and Judge Hepburn, in a well considered opinion, held that the township officers had properly discharged their duty in applying the funds as they did, and that the mandatory writ would hold nothing but the surplus that might remain, after defraying the ordinary and necessary expenses of the township.

The uniform policy of the Commonwealth, in relation to her turnpikes, railroads, and all other interests, as indicated by her legislation and the decisions of her courts, has been based upon the same principle, and we feel inclined to adhere to it, unless the court of last resort construes the law otherwise. The idea of locking up the county treasury and stopping the machinery of government, with all the disastrous consequences that must ensue, is a modern suggestion, entirely at variance with the policy of the government. We hope that the treasurer will see that it is his duty promptly to honor warrants drawn for the necessary current expenses of the county, as long as there are funds in his hands which have been assessed and collected for that purpose.

Commonwealth ex rel. Penitentiary v. Floyd, *supra*, 342; Larimer v. Pitt Township, *supra*, 353; Evans v. Pittsburgh, *supra*, 405; Loute v. Allegheny County, *supra*, 411; Commonwealth ex rel. Mitchell v. The Commissioners, *supra*, 417.

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*In the United States District Court for the Western District of  
Pennsylvania. In Admiralty.*

UNITED STATES v. STEAM TOWBOAT ALLEGHENY.

(Vol. X., p. 276. 1863.)

1. After seizure by the surveyor or collector of a port of the United States, a libel is filed to declare the forfeiture.
2. A claimant who is an inhabitant of an insurrectionary state, takes his *status* from such state.
3. Whether his capital be great or small, it contributes to swell the means of resistance, and is liable to confiscation.
4. Even his loyalty will not protect him, because being an integral part of a state in rebellion, he is treated as a public enemy.
5. New Orleans (the residence of claimant) having elected members of Con-



gress, the government of the state of Louisiana being yet under the control of the insurgents, the position of the claimant is not changed.

6. The persons "exercising the functions of government" there, not having disclaimed the acts of the insurgents, or suppressed the insurrection, the laws of the United States have not yet been fully vindicated.
7. A vessel owned in whole or in part by a resident of New Orleans, found in any other port of the United States, is subject to condemnation.

THIS case was argued by *Watson* for the claimant, and *Carnahan*, United States District Attorney, for the Government.

Opinion of the court, delivered by

MCCANDLESS, Dist. J.—This was a seizure by the surveyor of the port of Pittsburgh, under the provisions of the Act of Congress of the 13th July, 1861. The libel is filed upon information of the United States district attorney, to declare a forfeiture of the boat. Robert Watson, a citizen and inhabitant of New Orleans, in the state of Louisiana, is the owner of one-fourth of the vessel, the residue being the property of citizens of Pennsylvania. Louisiana is in a state of insurrection against the government of the United States.

The act provides that if the insurgents fail to disperse by the time fixed by the President, and when such insurgents claim to act under the authority of any state, or states, and such claim is not repudiated, or disclaimed by the persons exercising the functions of government in such state or states, nor such insurrection suppressed in such state or states, then the President shall declare, by proclamation, that the inhabitants of said state, or parts thereof, are in a state of insurrection against the United States, and all commercial intercourse between them and the rest of the United States shall cease and be unlawful, so long as such condition of hostility shall continue.

It is further provided, that any ship or vessel, belonging in whole or in part to any citizen or inhabitant of a state or part of a state, so in a state of insurrection, found at sea or in any port of the rest of the United States, shall be forfeited to the United States.

Independent of the admitted facts of this case, the history of this wicked rebellion, of which we have judicial knowledge, places the Louisiana claimant within the category of this law.

Even his loyalty will not protect him, for his capital, whether it be great or small, contributes to swell the means of resistance upon the part of the insurgents. Having the misfortune to be an integral part of an insurrectionary state, he takes his *status* from it, and is treated as a public enemy. His vessel must therefore be condemned, unless we can sustain the defence upon which he relies.

It is contended that inasmuch as New Orleans, his place of residence, is now in possession of the United States, and its citizens have so far returned to their allegiance as to elect members to Congress, the reason for the seizure has ceased, and the boat should be released from the custody of the officers. After much reflection the court cannot concur in this view of the case.

New Orleans was captured by a naval and military force under Commodore Farragut and General Butler, and its possession now is a military occupation by the army of the United States. Its government is a military government; and if, for a single day, it should be divested of the panoply of war, surrounded as it is by the public enemy, the action of its loyal citizens in the election of national representatives would be repudiated by the traitors within its municipal limits. Only a part of Louisiana is in possession of the United States, and in the language of the Act of Congress, "the persons exercising the functions of government in such state" have not "disclaimed" the acts of the insurgents, nor has "such insurrection been suppressed by said state." War, with all its tragic incidents, exist there yet, and the whole power of this great nation is brought into activity, to restore the constitutional jurisdiction of the United States. The state government is in the hands of the confederates, and although the national forces hold its capital, its principal city, and a large portion of its territory, the laws have not yet been fully vindicated, nor have the people returned to their allegiance.

Although by law we are bound to declare a sentence of forfeiture, the Secretary of the Treasury has power to relieve. And as we are satisfied of the inflexible loyalty of Robert Watson, we recommend that it be remitted by the secretary upon payment of costs.

Decree accordingly.

*In the United States Circuit Court for the Western District of  
Pennsylvania.*

UNITED STATES EX REL. HENDERSON v. WRIGHT.

(Vol. X., p. 305. 1863.)

1. As decided in the Turner Case, *supra*, 370, the enlistment of minors held to be illegal, in the absence of the consent of their parents or guardians.
2. A prisoner of war paroled by the enemy, although a minor, is not entitled to his discharge until after his exchange.
3. His father's claim to his services must be subordinated to the public exigency, to the higher claims of the nation.
4. The parole or promise given by the son, was 'for his good, for his liberty, and although a minor, it is binding upon him, independent of public or political reasons.
5. The government of the United States, from motives of humanity, have been compelled to treat the present rebellion as a public war, and to apply to it the rules of civilized warfare.
6. Parols given by prisoners of war are of sacred obligation, and the national faith is pledged for their fulfilment.
7. Cartels, or military agreements, for the exchange of prisoners, made by the officer in command, are of such force, under the law of nations, that even the sovereign cannot annul them.
8. Good faith and humanity ought to preside over the execution of these compacts, which are designed to mitigate the evils of war, without defeating its legitimate purposes.
9. These cartels have all the binding power of treaties, which, under the 6th article of the Constitution of the United States, are a part of the supreme law of the land.
10. When the minor is in an attitude to enable the government to comply with the cartel of their military officer, and the minor has been duly exchanged, the rights of the parent will be properly regarded.

*Thomas J. Keenan*, for the relator.

*Carnahan*, for the government.

The following opinion of the court was delivered by  
McCANDLESS, Dist. J.—If this case presented the single question as to the irregularity of the enlistment, the court would have little difficulty in deciding it. The fact of minority is established, and the right of the relator to the services of his son is admitted. But grave considerations of a public character arise, to which all

others of a domestic nature must be subordinated. The proofs show that John M. Henderson was enlisted in the month of August, 1861, in the 11th Pennsylvania regiment, Col. Coulter; that he was born on the 4th of August, 1843, and at the date of his enlistment he was about eighteen years of age. He participated with this gallant regiment in the battle of Fredericksburgh, was taken prisoner by the enemy in that bloody engagement, was removed to Richmond, and subsequently paroled. Upon his arrival within the United States lines, he was ordered to Camp Parole, at Annapolis, Maryland, from which he departed without leave, and was recently arrested by a provost-guard near his father's residence, in Westmoreland county. It appearing also that he was mustered into the service, without the consent, and against the wishes of his father, he would be entitled to his discharge, but for the reasons which the court will briefly proceed to assign.

The country is at war, and as the world acknowledges, "the greatest civil war known to the history of the human race." Although a rebellion, it has assumed such huge dimensions, with all the characteristics of a public war, that the government have been compelled, from motives of humanity, to treat it as such and to apply to it the rules of civilized warfare. It has also been so recognised by the highest judicial authority of the country. As the Supreme Court of the United States says, in that great opinion recently delivered by my Brother Grier, in the prize cases, "The parties belligerent in a public war, are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other, who claims a right to renounce their allegiance, and are in rebellion against their sovereign.

"Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared, it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy

in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, having commenced hostilities against their former sovereign, the world acknowledges them as belligerents and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign state, while the sovereign party treats them as insurgents and rebels who owe allegiance and who should be punished with death for their treason.

"The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars."

Belligerent rights, then, being conceded to the insurgents by both the executive and judicial departments of the government, let us see what is the usage and practice of nations as established by public law in cases of prisoners of war.

Savage nations put them to death. During the wars of the Middle Ages a ransom was substituted. Only within the last century or two was the mild and humane system of exchange introduced among the polished nations of Christendom. Mr. Wheaton tells us in his volume of *International Law*, page 393, "that cartels for the mutual exchange of prisoners of war are regulated by special convention between belligerent states, according to their respective interest and views of policy."

"Sometimes prisoners of war are permitted, by capitulation, to return to their own country, upon condition not to serve again during the war, or until duly exchanged. Good faith and humanity ought to preside over the execution of these compacts, which are designed to mitigate the evils of war, without defeating its legitimate purposes. Breach of good faith, in these transactions, can be punished only by withholding from the party guilty of such violation, the advantages stipulated by the cartel; or in cases which may be supposed to warrant such a resort, by reprisals or vindictive retaliation."

And in Vattel 354, we find that these cartels, or military

agreements, are held to be of sacred and of public obligation. A prisoner released on his parole enjoys the comfort of passing the time of his captivity in his own country, in the midst of his family, and the party who have released him rest as perfectly sure of him as if they had him confined in irons. "Such prisoners are dismissed on their parole, bound by promise not to carry arms for a certain time, or during the continuance of the war. And as every commander, necessarily, has a power of agreeing to the conditions on which the enemy admits his surrender, the engagements entered into by him, for saving his life or his liberty, with that of his men, are valid, as being made within the limits of his powers, and his sovereign cannot annul them."

It follows that these cartels have all the binding power of treaties, which, under the sixth article of the Constitution of the United States, are a part of the supreme law of the land.

This young man made a promise, for the fulfilment of which the national faith is pledged. It must be redeemed, or the national character is dishonored. Under the law of nations, the President could not discharge him until his exchange, and what the President of the United States cannot do, will not be assumed by the judiciary. The relator must yield his natural and domestic claims to the public exigency, to the higher claims of the nation, and when his son is in an attitude to enable the government to comply with the cartel of their military officer, his rights, as a parent, will be properly regarded. This may save his son from the danger of immediate execution, should he in future, by his rashness or misconduct, fall into the hands of the enemy. The parole or promise he gave was for his good, for his liberty, and although a minor, it is binding upon him, independent of public or political reasons: 2 Kent 269. As the regiment in which he fought was one of the most distinguished of the Pennsylvania line, and as this court is of opinion he is, by law, entitled to his discharge, after exchange, if there be no military accusation against him, we refer him favorably to the Secretary of War.

John M. Henderson is remanded to the custody of the United States Provost Marshal, to be returned to Camp Parole, Annapolis, Maryland, there to await the orders of the war department

for exchange as a prisoner of war, and the relator is ordered to pay the costs of this writ.

Turner's Case, *supra*, 370; Gallowan's Case, *supra*, 377; Wendt's Case, *supra*, 402; Markley's Case, *supra*, 380.

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*In the Supreme Court of Pennsylvania.*

COMMONWEALTH EX REL. BROWN v. COREY & Co.

(Vol. X., p. 393. 1863.)

1. Mandamus is a proper remedy to compel the builder of a lateral railroad to permit others to use his road, under the provisions of the 7th section of Act 5th May, 1832; nor is it a reason for excluding a transporter from the use of such road that he may carry his tonnage by some other road, nor that his cars and wagons would be an obstruction to the business of the proprietor.
2. The proprietor of a lateral railroad is bound to insert or suffer others to insert the necessary switches, sidings, and connections to get cars on and off the main track, and to permit cars, whether laden or empty, to pass up and down the road, according to the reasonable rules that prevail on other railroads.
3. Mandamus does not lie, when the relator who seeks to transport his coal over a lateral railroad has not opened or mined his coal or offered it in cars for transportation. If this has been caused by the refusal of the proprietor to pass the relator's empty cars into his mine, such refusal forms the matter of complaint; for he has an undoubted right to such a passage, and if the proprietor does not prescribe reasonable rules for its exercise, the court will prescribe them.
4. The transporter has no right to use the incline plane, the tippie, or schute, the screens, or the landing of the proprietor of a lateral railroad, as these are his private property.
5. When such transporter has provided himself with a landing immediately above that of the proprietor of the road, he must approach such landing from the head of the incline plane by means of his own providing.

ERROR to District Court of Allegheny county.

*Burgwin & Woods*, for plaintiff in error.

*Penney & Acheson*, *contra*.

The opinion of the court was delivered at Harrisburg, May 6, 1863, by

WOODWARD, J.—We have no doubt that a mandamus will lie, in a proper case, to compel the builder of a lateral railroad to permit others to use his road, under the provisions of the 7th section of the Lateral Railroad Law of 5th May, 1882, and no such excuses, as some of those set up by the respondents here, can ever be available. For instance, the pendency of proceedings for assessment of the owner's damages through whose land the road is laid, is no reason for excluding transporters from use of the road; nor the possibility that the transporter might convey his tonnage by some other route; nor the fact that his cars and wagons would be an obstruction to the business of the proprietors of the road. The law intrusts them with the possession and government of a public highway, and entitles them to a toll of four cents a mile, per ton, for the tonnage they carry for others, and it is their duty to afford the public all reasonable facilities for the use of the road. They are bound to insert or suffer others to insert the necessary switches, sidings, and connections to get cars on and off of the main track, and to permit cars, whether empty or laden, to pass up and down the road according to the usual and reasonable rules that prevail on other railroads.

If lateral railroads were private monopolies, and not, what they are, public highways, the law, under which they are built, could not be sustained on constitutional grounds. It has always been held to be constitutional, because it took private property, with compensation, for public purposes.

But we do not think this a case for mandamus, because the return sets forth, and the plaintiff's demurrer admits, that he has never opened or mined any of his coal, which he claims a right to transport on this road, nor prepared it in any manner for transportation, nor ever constructed any rooms, partings, entries or approaches by which he can bring his coal to the defendant's road for transportation, nor has he at any time brought to said road any coal in cars or vehicles of any kind or demanded the transportation thereof. These facts, admitted of record, are very substantial reasons for denying the plaintiff the extraordinary writ of mandamus at present. He claims to transport nothing but coal over the road, and as yet he has offered



none for transportation. If the reason be that he has not been permitted to pass his empty cars over the road into his mine, this should have been the subject of his complaint. He has an undoubted right to such a passage, and if the defendants do not prescribe reasonable rules for regulating the exercise of it, the courts will prescribe them.

But we do not think the plaintiff has any right to use the incline plane, the tipple, or schute, the screens, or the landing of the defendants. These are their private property provided for and essential to their own business, and constitute, in no necessary sense, any part of the public highway to the use of which the plaintiff is entitled. It is shown to us from the diagrams, that the plaintiff has provided himself with a landing on the river immediately above that of the defendants, and from the head of their plane he must approach his own landing by means of his own providing.

We have said more than was strictly necessary to the case, in the hope that when the respective rights of the parties were pointed out to them, they would themselves adjust them, on the principles of good neighborhood, and avoid further litigation.

The judgment is affirmed.

See *Brown v. Peterson & Corey*, 4 Wright 373; *Brown v. Corey & Peterson*, 7 Id. 495.

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*In the Circuit Court of the United States for the Western District of Pennsylvania. In Admiralty.*

THE UNITED STATES v. THE STEAMBOAT SCIENCE.

(Vol. XI., p. 9. 1863.)

1. The first section of the Act of Congress of 30th of August, 1852, which provides that steam vessels carrying passengers, if navigated without complying with the terms of this act, shall be subject to a certain penalty, viz: a fine of \$500, has reference only to those provisions of the act which prescribe what is necessary in order to obtain a license to carry passengers.
2. Offences committed against the other provisions of the act, and which occur after the vessel is fitted out and licensed, are not punishable under the first section, but have each a special penalty provided for them.
3. Therefore, a vessel duly licensed, after compliance with the preliminary

requisites, if subsequently navigated without having on board "a competent number of pilots," is not subject, therefor, to the penalty of the first section aforesaid.

APPEAL from the decree of the District Court.

This was a libel *in rem* upon information of the U. S. District Attorney, against the steamboat Science, for a violation of the Act of Congress of the 3d of August, 1852, which provides for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam. It was charged that the said steamboat did carry passengers on the Ohio river, from Gallipolis to Pittsburgh, and from Pittsburgh to Gallipolis and intervening places, and did leave the ports of Pittsburgh and Gallipolis with passengers to perform her said voyages without a complement of pilots duly licensed by the inspectors, as required by the said Act of Congress, and did perform said voyage without said complement of licensed pilots; and it is further charged that William Reno, the master of said vessel, who is not a licensed pilot, did perform the duties of one of the pilots, and did assist in navigating said vessel on said voyages.

It appeared from the evidence, that in the month of April last, this boat, commanded by William Reno, left the port of Pittsburgh for Gallipolis, with two pilots, and that at Gallipolis, one of them was discharged for drunkenness; that the other pilot and the captain navigated the boat back to Pittsburgh, and on their way up stopped at Mora Castle, to procure the services of a pilot, named Stewart. He could not go, but told the captain if he would call on his way down he would enter his service. On his return, Stewart did go on board, and with Kerr, the other regularly licensed pilot, took the boat to Portsmouth, and back to Pittsburgh. At Pittsburgh, Stewart stated that his license was about expiring, and that he would have to go to Cincinnati to renew it. He made the voyage again from Pittsburgh to Gallipolis, and back to Long Bottom or Moro Castle, where he left the boat, and failing to make the connection with her either at Pittsburgh or Moro Castle, he never returned to her service. The trips made by the boat after the discharge of Franklin Reno, and before the employment of Stewart, and after Stewart left and before Skaggs was employed, were made by Kerr, a regularly licensed pilot,

and William Reno, who had no license, operating the wheel which guides the vessel.

Upon hearing, before McCandless, Dist. J., the District Court decreed the condemnation of the steamboat, to be released upon payment of the penalty of \$500, provided by the Act of August 30, 1852, supplementing the Act of July 7, 1838, and the costs; whereupon this appeal was taken.

The opinion of the court below was published in 10 *Legal Journal*, p. 203.

*R. B. Carnahan* appeared for the United States.

*D. W. Bell*, for the owners.

Opinion of Circuit Court, filed May 15, 1863, by

GRIER, J.—The libel of information sets forth that by Act of Congress of 30th August, 1852, it is provided that no license, register or enrolment under the provisions of said act or that to which it is a supplement, shall be granted, or other papers issued by any collector to any vessel propelled by steam and carrying passengers, until he shall have produced satisfactory evidence that all the provisions of the said act have been fully complied with. And if any such vessel shall be navigated with passengers on board, without complying with the terms of said act, the owner thereof and the said vessel itself shall be subject to the penalties contained in the 2d section of the act to which this is a supplement, viz., Act of 1838, chap. 191; that by a further provision of the act it is declared unlawful for any person to employ, or any person to serve as engineer or pilot on any such vessel, who is not licensed by the inspectors, &c.; that the steamboat *Science* was duly enrolled and licensed in conformity with the Act of Congress, and was afterwards used and employed in the transportation of passengers from Pittsburgh to Gallipolis, without a complement of licensed pilots, and the libellants aver that William Reno, the master, who is not a licensed pilot, did perform the duties of one of the pilots and did assist in navigating said vessel on said voyages. By reason whereof the boat is liable to pay to the United States the sum of five hundred dollars.

Without giving a narrative of the various changes of pilots on this boat by reason of drunkenness, sickness or other causes, the evidence shows only that William Reno, the captain, who was not a licensed pilot, had acted as assistant pilot on a trip from Pittsburgh to Gallipolis.

I have searched in vain for any provision in this Act of 1852, under which this forfeiture is claimed, defining what is "a competent number of pilots," or inflicting this penalty on the boat or its owners for a neglect or insufficiency in that respect. The 6th section of the Act of 1838, to which this is a supplement, makes it the duty of the owners and masters of licensed steamboats to employ on board of their boats "a competent number" of experienced and skilful engineers, and in case of neglect, the owners and masters shall be held responsible for all damages to the property of any passenger on board occasioned by explosions, &c., &c.

Whether Captain Reno, who steered his own boat without a pilot's license, was liable to the penalty of one hundred dollars, under the tenth provision of the 9th section, is a question not before us. This penalty for employing or being employed as such may be recovered in an action of debt, *qui tam*. It is admitted he had one licensed pilot on board and acted as steersman himself occasionally. Whether this subjected him to the penalty, we need not decide. Now, what are the provisions of this Act of 1852, for non-compliance with which the vessel and owners are made liable to this penalty of five hundred dollars.

Is this penalty of the first section to apply to all the offences against the act, whether committed by owners, builders, engineers or pilots? Is it a cumulative penalty on the poor boat for the non-feasance or misfeasance of every person employed in or about her? This is a liberality of construction of penal acts which is without precedent.

The first section forbids a boat to be licensed to carry passengers until they have satisfactory evidence that all the provisions of the act have been fully complied with, "and if any such vessel shall be navigated without complying with the terms of this act, the owners and vessels shall be subject to the penalties." Now it is plain that the provisions of the act referred to are those which are necessary to obtain a license to carry passengers.

The collector is not punished for giving a license to the vessel without compliance with these regulations for safety of passengers, but the owners are compelled to see that they have been complied with before they attempt to carry the passengers. The penalty for breach of duty of both the public officer and the owner is inflicted wholly on the latter. These are all found within the first six sections of the act which prescribes the rules to be observed in the construction and necessary furniture of the boat.

It is to protect the passenger against the avarice, neglect or carelessness of the owners, in taking precautions necessary to the safety of the lives of passengers: 1st. Against fire; 2d. For pumps; 3d. Hose; 4th. Boats and life-preserving floats, axes, buckets; 5th. Sufficient passages between decks.

These are all required to make the vessel seaworthy for the purpose intended. And the collector is not only forbidden to license the vessels without compliance of the owners with the regulations, but the owners are punished for neglecting to comply with them.

The penalty inflicted by the 1st section can have no application to the offences committed against the other provisions of the act, and which occur after the vessel is fitted out and licensed to carry passengers. The act, therefore, provides for a special penalty in each case.

The 7th section provides against carrying certain dangerous articles without special license, and subjects the offender to a fine of one hundred dollars.

The 8th forbids gunpowder, oil of vitriol, and other explosive materials, to be carried, unless packed or put up as directed, and every one who shall pack or put them up otherwise, shall be deemed guilty of a misdemeanor and punished by a fine not exceeding a thousand dollars.

The 9th section provides for the appointment of inspectors; prescribes their duties, to inspect boilers, safety valves, &c.; to give certificates of approval; to give licenses to carry certain dangerous articles; to examine and classify engineers and pilots and grant them licenses.

To enforce this provision as to pilots, it was necessary to re-

strain unlicensed pilots from offering themselves for employment, and the masters of vessels from employing them. This is provided for in the 10th sub-division of the 9th section, as follows : "It shall be unlawful for any person to employ or any person to serve as engineer or pilot on any such vessel, who is not licensed by the inspectors, and any one so offending shall forfeit one hundred dollars."

Then follow penalties for obstructions or deranging the means of regulating the pressure ; for allowing the water to fall below a certain level in the boilers, &c.

Provision is then made to protect the public against negligence or the frauds of boiler makers, prescribing the examination of boiler plates and their qualities ; requiring the plates to be stamped, and have the name of the manufacturer and quality of the iron, &c. ; inflicting a penalty for making or using boilers made of unstamped plates, of five hundred dollars ; also the same penalty for using false stamps, &c.

The 24th section subjects the collectors and inspectors to a penalty for not enforcing the law.

The 25th inflicts a penalty on the master for navigating the vessel without a certificate of the collector and inspectors, to be kept posted in a conspicuous place on the steamboat.

Section 26th prescribes the penalties of inspectors for furnishing false certificates.

Section 27th subjects the master to a fine of five hundred dollars for navigating the boat whose boilers, engine and equipments are not in all things conformable to the certificate.

Section 29th inflicts a fine of thirty dollars besides liability for damages, on the pilot, engineer and master for violation of the rules and regulations in passing other boats.

And finally, the 30th section makes the owners liable for damages to passengers and baggage, as also the captain and vessel, when such damage arises from a neglect to comply with the provisions of the law, and defect or imperfections of the steamer's apparatus.

Now we have the owners and the vessel liable for all damage resulting from the ignorance, negligence or fraud, not only of the master but of manufacturers, collectors, inspectors, pilots,

&c. And the decree of the court below, moreover, inflicts a fine of five hundred dollars on them where no damages have resulted. And it would seem, because the vessel has not a "complement" of licensed pilots to navigate her between ports "so distant from each other," she is to be subjected to a penalty for an offence not to be found in the Act of Congress, but which the court is asked to punish as a constructive offence, to enforce the policy of the law and protect passengers. It must be observed that the only offence charged or proven is that of a master acting as pilot without a license, who conducted the boat in safety and has nevertheless paid the fine for his offence. If the 1st section of the act adds this penalty on the boat and owners for the offence of another, why not for all the other offences punishable by the act, boiler makers, iron masters, engineers, inspectors, &c.? Such a construction is unjust to the owners and would stultify the legislature.

They never intended to inflict two penalties on the same parties for one offence, nor to punish two parties for the same offence, he party committing it one hundred dollars, and the party who did not commit it five hundred dollars.

Let a decree be entered dismissing the libel of information.

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*In the Supreme Court of Pennsylvania.*

KRATZ' APPEAL.

(Vol. XI., p. 12. 1863.)

1. When an Act of Assembly provides for notice in a newspaper, it always means an English paper, unless some other be expressly mentioned.
2. *Tyler v. Bowen*, 1 Pittsb. 225, affirmed.

CERTIORARI to the Quarter Sessions of Montgomery County.

This was a proceeding to open a road. The law required certain notices in such cases to be given in two newspapers. The notices were published in German papers. This the court held to be sufficient, overruling the exception of counsel thereto. This ruling was assigned for error.

*George N. Corson*, for exceptants.

*S. N. Rich*, *contra*.

The opinion of the court was delivered, February 19, 1863, at Philadelphia, by

LOWRIE, C. J.—The road law of Montgomery county requires notice of views to be given in two newspapers, and a rule of the court requires the proof of such notice to accompany the report, and thus it appears by the record what notice was given. It was by advertisement in two German papers and in the German language.

This court decided long ago, in *Tyler v. Bowen*, 1 Pittsb. 225, that this is not according to law. The law must have a definite meaning, and therefore it cannot mean that public notice may be given in any language that one of the parties may chose to employ, but in the ordinary language of the country which is used in judicial proceedings. It is very proper for the legislature to provide differently for those parts of the state where the German language prevails, but we cannot do so with safety and certainty.

Since this proceeding commenced, the legislature has authorized the use of the German language in public notices about roads in Montgomery county, but it has left it to accident to decide whether the notices shall be in German or in English papers. It is to be regretted that this matter was not left to be regulated by a rule of the Quarter Sessions. Proceedings quashed.

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*In the Common Pleas of Butler County.*

CROCKER v. WOLFORD.

(Vol. XI., p. 65. 1863.)

The Act of Congress of 25th February, 1862, authorizing the issue of the legal tender notes of the United States, is constitutional.

RULE to show cause why *fi. fa.* should not be set aside, &c.

AGNEW, P. J.—The defendant tendered to the plaintiff the



amount of the judgment in legal tender notes of the United States. The plaintiff refused the tender, and issued execution, with the instruction to the sheriff to collect the same in coin. The defendant has moved to set aside the execution upon the ground of the tender, &c.

The Act of Congress of the 25th February, 1862, provides that the treasury notes to be issued under it "shall also be lawful money and a legal tender in payment of all debts, public and private, except duties on imports and interest, as aforesaid."

The question is whether the law, impressing upon these issues of the government the quality of money, and making them a legal medium for the payment of debts, is constitutional. The power to pass it must be found in the Constitution, and in seeking for it we are not to adopt a latitudinarian rule of interpretation.

The chief difficulty, it seems to me, with those who have argued against it, has been their inability to find a general power in Congress to declare what shall be a legal tender, or to trace it by direct logical inference to some one of the expressed powers. Such was the course of argument of the judges of the Supreme Court for the city district of New York. They contend, therefore, with much show of reasoning, that it does not flow from the power to coin money and regulate the value thereof, because that power is limited to the precious metals; that it does not flow from the power to borrow money, because Congress may borrow even on its bills of credit without necessarily requiring them to be received in the payment of debts; that it does not flow from the power to regulate commerce, carry on war, &c., &c., because their use in payment of private debts is not a necessary consequence of the exercise of these powers.

I am not disposed to waste time in this controversy, and, though not yielding the point, will concede, for argument sake, that a general power to declare what shall be a legal tender in payment of debts, beyond specie or coined metal, cannot be traced directly, by mere logical inference, to any of the specific powers. The justification of the act must, therefore, be found in the nature of the thing itself and its relation, in this specific case, as a means to carry into execution some one or more of the expressed powers of the Constitution.

If the nature of the act and its relation to any expressed power bring it within the range of measures fairly necessary and proper for its exercise, it then falls within the express power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all the powers vested by this constitution in the government of the United States, or in any department or officer thereof."

I pass by also the question whether the last mentioned grant of power extends the authority of Congress beyond that which a fair implication from the powers expressed would give. It is true that the Supreme Court have settled this question in the case of *United States v. Fisher et al.*, *Assignees of Blight*, 2 Cranch 358, and *M'Culloch v. Maryland*, 4 Wheat. 316, in which it is held that this clause is in itself an express grant of power, and the right of Congress to employ the necessary means for the execution of the powers of government, is not left," says Ch. J. Marshall, to "general reasoning."

But waiving this question, the point simply is, whether the act in question be necessary and proper to carry out any of the expressed powers of the Constitution. The subject of examination is, therefore, the nature and relation of the provision that these treasury bills shall be deemed money, and receivable in payment of public and private debts.

Bearing on this point is the range within which constitutional necessity and propriety are found, as gathered from the uniform and undisputed practice of the government, and from judicial decisions; or in other words the range within which the relation of the thing authorized to be done as a constitutional means of exercising some power of the government is to be found.

Let us select a few examples for the practical illustration of this point.

By Act of Congress, public ministers, charges, consuls, &c., shall not correspond with public newspapers, nor recommend persons to office, nor accept presents: the President shall prescribe regulations, orders and instructions for business, including the "procurement and transmission of the products of the arts, sciences, manufactures, agriculture and commerce." "Pass-

ports" shall be granted "under such rules as the President shall designate and prescribe."

These acts of legislation rest solely on the power "to regulate commerce with foreign nations," and "to appoint ambassadors, other public ministers, and consuls." The power to regulate their conduct does not necessarily or logically flow from the power to appoint ambassadors, but is only inferred as fit and proper. The power to regulate does not necessarily imply that ministers shall not express their views through the press, nor recommend persons to office, or procure foreign specimens of arts, &c.; yet the fitness of the thing has appeared to Congress as a fact growing out of the nature of the business to be performed, and no one has ever doubted these powers of Congress thus exercised, as "necessary and proper." Under the power "to promote the progress of science and the useful arts by securing for a limited time to authors and inventors, the exclusive right of their respective writings and discoveries," Congress has regulated the assignment of the patent after its issue, by recording laws; and even the sales of the article patented, by requiring it to be stamped with the date. One would think the patent itself secured his invention to the patentee without legislation upon his subsequent acts.

Under the clause of the Constitution that fugitives from labor "shall be delivered upon claim of the party to whom such service or labor may be due," Congress has not only provided for their arrest and surrender, but has regulated the power of attorney given by the claimant, the officers to take jurisdiction, prescribed the *ex parte* evidence sufficient, provided penalties for obstructions and hindrances, and even given a civil action for the sum of \$1000 to the party injured. These provisions have all been decided to be constitutional.

Congress has impressed upon debts due the United States a legal efficacy, which secures to them priority of payment, in case of the insolvency of the debtor or of his estate; and has extended this protection even to the surety for the debt.

This legislation has been repeatedly before the Supreme Court of the United States, and always sustained. It might be asked, with greater force than in the present case, on what principle

does the United States come in upon the estates of deceased persons, mere private individuals, and claim a priority for its own debts, setting aside all the gradations of payments made by state laws over a subject which seems purely to belong to state legislation; and after payment convey over this preference to the surety. It can be traced to no specific power, but was sustained by the court expressly under the clause giving power to make all laws necessary and proper for carrying into execution the other powers. See *United States v. Fisher et al.*, Assignees of Blight, 2 Cranch 358.

Congress has authorized the President to furnish friendly Indians with useful domestic animals and implements of husbandry, and with goods such as he thinks proper. Also to employ capable persons of good moral character to instruct them in the mode of agriculture suited to their situation, and for teaching their children in reading, writing, arithmetic, &c. The only powers to which these acts are referred are "to regulate commerce with the Indian tribes," and "to make all needful rules and regulations respecting the territory or other property of the United States." The distance seems to be remote between furnishing implements of agriculture and goods, and teaching the Indians; and the regulation of commerce or the making of rules and regulations for the territory, which the courts have said means lands.

Under the power to regulate commerce, Congress has legislated upon the shipment of seamen, their articles of shipping, form and effect, wages, time of coming on board, neglects, desertions, discharge in foreign ports, sending home destitute seamen, &c.; also providing for medicine chests, water and provisions on board, short allowance, &c.

Here we must first infer, as we are told by C. J. Marshall, the power to regulate navigation from the power to regulate commerce. Then secondly, we must infer the fitness of these various provisions to the interests of navigation and shipping. The relation between the power to be exercised, viz., to regulate commerce, and the nature or fitness of the means, such as the regulation of seamen, their rights, defaults, &c., seems to be very

remote ; yet these powers have never been doubted, and indeed should not be.

Under the power "to establish post-offices and post roads," Congress has not confined itself to our own soil, but has gone abroad and authorized mails to be carried over the ocean, established routes across the isthmus, purchased steamships and regulated their running, and authorized the appointment of agents abroad, &c.

Congress has also established an agricultural department, and a public printing office, not by reason of any express authority, but only because of their fitness to facilitate the execution of other powers.

Congress has exercised many powers purely attendant, and not essential, in numerous cases, by prescribing modes and forms of procedure, oaths of office and oaths of procedure, bonds for security of individual as well as public duties, declared offences and provided penalties. In hundreds of instances these powers are not essential, but simply conducive to the execution of other powers ; and render their exercise merely more safe or more convenient. Let any one examine the minutiae of legislation under any one great branch of power, and he will find many so much further removed from their source than the value and effect of treasury notes, from the authority to issue them, he will think that in comparison, they are but parasites clinging by attachment only to the true stock.

Thus the practice of government has established a rule of construction for the exercise of incidental powers arising from mere fitness and convenience, and not from necessary sequence or relation—so clear, so frequent and so overwhelming, that no sane man would now attempt to overthrow it. It is so interwoven with the whole fabric of the Constitution, that to do so would be to destroy the government itself.

This doctrine has also received the highest judicial sanction. In the case of *M'Culloch v. The State of Maryland*, 4 Wheaton 316, C. J. Marshall shows conclusively that the word "necessary," in the clause authorizing the use of powers proper to carry out the other powers, "imports no more than that one thing is convenient, or useful, or essential to another," and concludes

thus: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate—let it be within the scope of the Constitution, and all the means which are appropriate, which plainly are adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." See also, the language of C. J. Marshall in *United States v. Fisher et al.*, *Assignees of Blight*, 2 Cranch 358, which we shall hereafter quote.

Thus much we have seen as to the character or fitness of the means to be used, and the extent of their range in the execution of a power expressly conferred. Next, let us look a moment to the nature and use of bills of credit or treasury notes.

These bills of credit were well known as money in colonial history, including the legal tender feature. The first issue of them under the present Constitution was in 1812, for the purpose of raising money to carry on the war with Great Britain. The Act of June 30, 1812, not only provided for their issue, but for their legal incidents. They were to be payable to the order of the person who should become the owner, should be transferable by his endorsement, and by delivery should be payable in one year, at the places designated on their face; should be used at par to pay debts and borrow money; be receivable in payment of public dues and taxes, and be paid out of a sinking fund, and should be protected against counterfeiting.

The power has been repeatedly exercised, and in nearly the same terms. The provisions of the laws clearly denoted the intention of Congress that these issues should supply the place of money, while their history shows that, in fact, they were so used.

The use of bills and notes as money when issued by banks or the government, is one sanctioned not only by the customs of trade, but by judicial decision. Such government bills are even

higher as a security, and better as a representative of money than those of banks, resting, as they do, on the basis of the whole taxable property of the nation for their credit. The use of bank notes as money is the subject of frequent judicial decision. In *Miller v. Rose*, 1 Burrows 457, Lord Mansfield said, "Now, they are not goods, nor securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payment as money or cash."

The same doctrine is held by C. J. Gibson, in his masterly opinion in *Bayard v. Shunk*, 1 W. & S. 95, referring to the case of *Miller v. Rose*; *Hobson v. Fountain*, 5 Humphrey 140, maintains that money is a general term, embracing every description of coin or bank note recognised by common consent, as a representative value in exchange of property and payment of debts. The Supreme Court of the United States recognises the same doctrine. In the *Bank of the United States v. Bank of Georgia*, 10 Wheaton 388, Justice Story says: "Bank notes constitute a part of the common currency of the country, and ordinarily pass as money. When they are received as payment, the receipt is always given for them as money. They are a good tender as money, unless specially objected to; and, as Lord Mansfield observed in *Miller v. Rose*, 1 Burrows 457, they are not, like bills of exchange, considered as mere securities or documents for debts."

But the facts of our own observation speak louder to us than the declarations of others. We know that these treasury notes fill the channels of trade and business to the very brim, and have become a vital part of our currency as money to a vast extent, supplanting largely the volume of bank notes.

The right of Congress to authorize the issue of these bills of credit or promissory notes of the government, in the form and with the legal capacity always heretofore adopted, as the means of raising money to carry on the operations of the government, both civil and military, in time of peace or in time of war, has

been settled, and is not now disputed, and cannot be. The fact that they have been accepted and received as money, is also beyond dispute. This, then, is the settled character of these bills in point of fact and in the estimation of the law.

The only question, then, which remains is, can Congress add to this their customary and conventional character a legal sanction which declares them to be money, and receivable in payment of public and private debts? This is all the Treasury Note Bill of February 25, 1862, has undertaken to do; to stamp upon these bills a legal character as money, in addition to the conventional, to the end that they shall be better adapted, and more serviceable to the government as an effective means of obtaining money "to raise and support armies," "provide and maintain a navy," and "provide for calling out the militia to execute the laws of the Union, suppress insurrections and repel invasions," as well as to provide the ways and means of carrying on the government generally.

Why should not Congress add this legal character as money, to their acknowledged character as money by usage? Why should it not stamp on the bill this legal effect as a means of making it effective to the designed end of raising money? True, the Constitution may not give a general power to declare this or that a legal tender in payment of debts; but what clause of the Constitution, or portion of its spirit, forbids to Congress the use of this as a means to accomplish the end in this particular case and emergency? What part of the Constitution prohibits Congress, when authorizing an instrument within the scope of its acknowledged power, from affixing to it certain legal incidents and effects? If the purpose and intent of the instrument is that it is to be used as money, what reason will prevent Congress from saying it shall be so accepted and received (for this is all that a tender effects), if this be necessary, under the circumstances of legislation, to obtain the money it is intended to raise?

The instrument itself is the creature of law, and this involves its incidents and legal effect. The power to create involves the power to affix its legal character, while the extent of the legal incidents are limited only by their fitness as the means to be used to the legislative end. The end is to raise money for law-



ful purposes. If the legal incident as money, is necessary as a means to this end, the means is justified, and falls within the authority to pass laws necessary and proper to the execution of this power.

A tender is merely an offer, and it is a legal tender only because of the obligation to receive. The true point of the controversy therefore lies in the value and effect of the bill. It is because Congress has given to the bill a legal value at its face as so much money, and a legal effect as a medium for the payment of debts, that it becomes a subject of legal tender. It is because the debtor offers to his creditor a thing having a certain legal value and effect, that the offer becomes binding on the creditor. Hence, when Congress said these bills should be money, and a legal tender for payment of debts, it merely legislated upon the value and effect of the bill itself, the creature of its admitted creative power.

The only point left, therefore, is, was this legal impress necessary as a means to make these bills available under the circumstances of legislation to raise the needed money?

Currency, or transmission from hand to hand, is essential to the effectiveness of the bill for its intended purpose; but this currency depends upon its character and use as money. Hence the necessity it should be declared to be money, and to have the legal effect of money in payment of debts, provided the circumstances seem to demand it; of which Congress must judge.

The argument of the Supreme Court in the city of New York, that a power to raise money does not necessarily imply a power to make the bill a tender in payment of private debts is conceded. It is very true that the government may issue its bills of credit in payment of loans, and raise money upon them, and that it does not necessarily, or even often, follow that they should be a legal tender for private debts. There is no logical conclusion from one to the other. But it is also true, that a state of facts may exist rendering it not only proper, but absolutely necessary that the bill should have the value and effect of money as a legal tender, in order to make it effective for the purpose of its issue. This is simply a matter of fact, not one of necessary sequence or logic. If at the time of legislation, it was necessary to give the

bill the character and effect of money, to accomplish its purpose, it then *pro hac vice* became a part of the means and fell within the constitutional grant of power to make laws necessary and proper to execute the main power; and of this necessity Congress must judge.

An apt illustration of this rule of construction, and authority for it, will be found in the case of *United States v. Fisher et al., Assignees of Blight*, 2 Cranch 358. The question arose on the authority of Congress to stamp a legal effect upon debts due to the United States, which gave them priority over all other debts, and even in opposition to the provisions of state laws. Said Chief Justice Marshall, "If the act has attempted to give the United States a preference in the case before the court, it remains to inquire whether the Constitution obstructs its operation.

"To the general observations on this subject, it will only be observed that as the court can never be unmindful of the solemn duty imposed on the judicial department, when a claim is supported by an act which conflicts with the Constitution, so the court can never be unmindful of its duty to obey laws which are authorized by that instrument.

"In the case at bar the preference claimed by the United States is not prohibited; but it has been truly said that under a Constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.

"It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States, or in any department or officer thereof.

"In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indisputably necessary to give effect to a specified power.

"Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end could be attained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution. The government is to pay the debt

of the Union, and must be authorized to use the means which appear to itself most eligible to effect the object. It has consequently a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe.

“This claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignties respecting the dignity of debts, and will defeat the means they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers. But this is an objection to the Constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends.”

The language of the chief justice is so appropriate to the case in hand, I have thought proper to draw largely upon this great—indeed sacred—fund of national authority.

It remains now only to consider the propriety of the legal character given to these bills as money, in order to determine its appropriateness as a means to make them efficacious in raising money. Though we cannot overrule the judgment of Congress in a question of means to the end, we have the right to see that it has a reasonable adaptation as a means to the end proposed.

The state of the country at the time of the passing of the law fully exhibited the adaptation here. The United States were contending against the most gigantic rebellion the world ever saw. The armies and navies, armaments and operation by land and sea were greater than the continent ever witnessed, and indeed were seldom, if ever, paralleled by the old world. The expenditures of the government were millions daily, and the source of money confined to our own people. We could not borrow abroad. Confidence abroad in our ability was shaken by the agents of rebellion. The London Times, the great index of English opinion, had endeavored to write down our ability to pay.

At home our banks had poured out large sums to supply the treasury, and their whole capital, could it have been withdrawn from the channels of trade, was scarcely sufficient to furnish the sums needed. Wisdom required that the industry of the country

should be fostered instead of being prostrated by the absorption of the capital essential to its existence. The government had already drawn so largely upon these sources of supply, that further drafts would have been ruinous. The whole specie of the country, if within reach, would have been inadequate. The issue of bills of credit to an extraordinary amount seemed to be a necessity. But the very scale upon which the issue had to be made, was itself a cause of extraordinary depreciation. Who would lend money at par, or at any reasonable rate of discount, upon a security which necessarily must depreciate, without some attribute or legal effect to make it available in his hands? What justice was there in throwing upon the hands of our soldiers in the field, a currency robbed of half its nominal value, and useless as money? Circulation was the life blood of it. Without the character and effect of money it must fall flat upon the market, and the government fail to get money at all, or get it at a ruinous sacrifice.

It will not do to answer that the mode of raising money by treasury notes was unwise. It is an admitted mode, and being within the choice of Congress, the question is simply as to the means necessary to give it efficiency. It therefore became necessary to stamp the issue with a legal character and effect, which would pass it into the channels of trade, make it current in the ordinary business of men, carry it from hand to hand with a belief in its power to pass as money, and would inspire confidence. Otherwise, he who took it to-day would be uncertain how far it would serve his purpose to-morrow, and it would be rejected.

In ordinary times of peace, or a time of war unlikely to impair the credit of the government, the mere bills of the government, without any other currency as money than that conceded to it by custom, might serve to obtain loans. But here, the result of the war, if ending in dissolution, must necessarily extinguish a large basis of their credit by the loss of the states which had seceded, and the uncertainty of the future of those remaining. One hundred and fifty millions of treasury notes, with a prospect of a much larger increase of the national debt, could not but appall the sensitive nerves of credit. The necessity, therefore, of giving these bills the character of money and making them a legal

means of paying debts, in order to make them effective, was so strongly apparent that Congress could not help but use this power as auxiliary to the main purpose.

The relationship of the means to the end is not only probable, and for that reason binding on the courts, but so clearly needful, no judge could hesitate. In this connection, the language of Chief Justice Marshall, in *Fletcher v. Peck*, 6 Cranch 87, is opportune: "The question whether a law be void for its repugnancy to the Constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication or vague conjecture the legislature is to be supposed to have transcended its powers and its acts considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

In times like these, when my country is engaged in war and struggling for existence, when its credit is the only basis of its power to procure supplies, when its promises are now floating through every channel of public and private affairs, and when the poor more strongly than the rich need protection against loss upon these issues, I should deem myself a traitor to human good, as well as to my country's best interests, could I lightly reject the law upon which these interests hang with so much weight. It is a satisfaction to feel that the case is clear; but if, on the contrary, strain I must, I would strain to preserve all that my heart holds dear, and all that love and hope sanctify to the good of mankind, in the existence and well-being of our country.

*Mather v. Kinike*, 1 P. F. Smith 425; *Legal Tender Cases*, 2 Id. 9; *Christ Church v. Fuechsel*, 4 Id. 73; *Aurentz v. Porter*, 6 Id. 115; *Benners v. Clemens*, 8 Id. 24; *Frank v. Calhoun*, 9 Id. 381; *Rankin v. Demott*, 11 Id. 263; *McCalla v. Ely*, 14 Id. 254.

*In the District Court of the United States for the Western District of Pennsylvania.*

## UNITED STATES v. WILL.

(Vol. XI., p. 73. 1863.)

1. The Act of Congress of the 3d March, 1863, commonly called the "Conscription Act," construed.
2. There is no penalty provided for resisting the enrolment.
3. The 25th section, imposing a penalty, has reference to the draft, and the draft alone.
4. It can bear no other grammatical construction, and that is its fair legal interpretation.

THIS was a motion in arrest of judgment, and was argued by *Noon, Mageehan, and Johnston*, of Cambria county, for the defendant, and by *Carnahan*, United States Attorney, for the Government.

Opinion of the court, delivered at Williamsport, September 21, 1863, by

McCANDLESS, Dist. J.—This case was argued at Pittsburgh, with marked ability, and this opinion written there, but as it involved a principle of national importance, I have delayed the announcement of my decision, until I could have a conference here with my brother, Mr. Justice Grier. I am pleased to say that we concur in opinion.

The defendant was convicted at the late term of this court upon an indictment charging him with "obstructing, hindering, and delaying" an enrolling officer in the performance of his duties. The indictment is framed under the 25th section of the Act of the 3d of March last, commonly called the "Conscription Act." It is moved in arrest of judgment:

1. That the Act of Congress, under which the indictment is drawn, does not provide any punishment for the offence for which the defendant is indicted.

An Act of Congress passed during the commotion of a civil war, is sometimes difficult of construction. Its peace and war-like provisions must be separated, and the penal sanctions appli-

cable to the one, should not be applied to the other. I have been impressed with this distinction in examining the provisions of the act in question. Its title indicates that it has two objects: first, "enrolling," and second, "calling out" or drafting the "national forces." The first is a peaceful measure, the other is an order peremptory in its character and requiring force to support it.

Since the world began, all civilized nations at given periods in their history have ascertained not only their material wealth, but their physical force. In ancient times it was an authentic declaration, before the Censors, by the citizens, of their names and places of abode. In the United States, this enumeration has been once in ten years, and its primary object is to fix the rate of representation in Congress, but to this is now added a vast compendium of the national resources. When a great public emergency arises Congress may direct another, and an intermediate enumeration for the purpose of ascertaining the power they possess to suppress insurrection or repel invasion, and this they have done in the present instance, the census of 1860 affording but an imperfect guide to the national strength in 1863. Congress had a right to suppose, and did suppose, that the enrolment would be a peaceful measure, in which there would be a general acquiescence, and which required neither penalties nor military authority to accomplish it. The national force was to be found by the same mild means that an assessor would fix the value of real estate, or other property subject to taxation. From the past history of the American people, Congress did not presume that there would be any resistance to a measure preliminary in its character. The act is not for the time being only, for this register of the people is to occur every two years, and without limitation. Congress designed that the government should at all times be ready, whether for a foreign war, or any new complication of domestic difficulties. Wise statesmen always anticipate such emergencies and provide for them. They have done so here in trying to reduce to precision the force or power upon which they could rely to restore the rightful authority of the government.

The first eleven sections of this act are wholly taken up with provisions relative to the enrolment, and there is no penalty inter-

posed for resisting the enrolling officer, or omitting to respond to his inquiries, if he should choose to make them. Thus far the act treats the enrolment as a thing complete in itself. A draft may or may not be made. That is to happen when, in the judgment of the President, the public safety may require it. By the twelfth section, he is then authorized to assign "to each district," the number of men to be furnished by each district and "thereupon" the enrolling board shall, under the direction of the President, "make a draft." This is the first exhibition of the warlike power. Then spring into activity the provost marshals, other officers and their subordinates, who are to draw or "call out" the people, in given classes, who have been previously enrolled. They are to answer the President's demand, or upon failure, they become, for the first time, subject to the Rules and Articles of War, except where the act directs that they shall be turned over to the civil authorities for trial. As was well said, upon the argument, the enrolment left every man where he was, minding his own business; the draft took the citizen from his home, his parents, his wife, or his children. Hence Congress might well consider the enrolment able to take care of itself; while the draft should be guarded by severe penalties.

Full directions are given in the following sections, as to the mode of conducting the draft, until we arrive at the 24th and 25th, which may be termed the penal clauses of the bill. As this indictment derives its validity from the latter, this brings us to the consideration of the other reason assigned for arresting this judgment, which is,

2. That the indictment sets forth no crime for which the defendant can be convicted.

The point is well taken. The section declares, "that if any person shall resist any draft of men enrolled under this act into the service of the United States, or shall counsel or aid any person to resist any such draft; or shall assault or obstruct any officer in making such draft, or in the performance of any service in relation thereto; or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted man not to appear at the place of rendezvous, or wilfully dissuade them from the performance of military duty as required by law, such



person shall be subject to summary arrest by the provost marshal, and shall be forthwith delivered to the civil authorities, and upon conviction thereof, be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both of said punishments."

It will be borne in mind that the indictment charges that the defendant did "assault" the "enrolling officer," and "did hinder, delay and obstruct" him, in the performance of his official duties. But the section has no reference to the enrolment except in the past tense, as a fact accomplished, an act consummated. The draft is the subject-matter treated of, and the draft alone. It is the draft of men already "enrolled" under the provisions of the act. The clause "or in the performance of any service in relation thereto," can have for its antecedent the draft and nothing else. The sentence can bear no other grammatical construction, and that is its fair legal interpretation.

Congress having provided no penalty for obstructing the enrolment, we must take the law as we find it, and not create an offence by intendment. If experience has shown that the officers charged with this public function, are not sufficiently protected, the omission can be supplied at the next session, and before, by the terms of the act, the next biennial enrolment is to take place. As the law now stands, the opinion of the court is with the defendant on both the points submitted, and the judgment is arrested.

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*In the Court of Quarter Sessions of Erie County.*

COMMONWEALTH v. REED.

(Vol. XI., p. 154. 1863.)

1. In cases of fornication and bastardy, when the mother is a *feme covert*, her declarations made at the time of parturition and afterwards persisted in as to who was the father of the child, are not competent testimony under section 37 of the Criminal Code of 1860.
2. Death-bed declarations as to who committed an offence, are only competent in cases of homicide.
3. Neither husband nor wife is competent to prove non-access on the part of the husband, either in a civil or criminal case.

INDICTMENT for fornication and bastardy to August Sessions, 1863, tried November 4, 1863.

*Davenport*, District Attorney, *Douglas & Laird*, for prosecution.

*Walker, De Camp & Grant*, for defence.

It being admitted that Ellen Cornell, the mother of the bastard child, was at the time it was begotten a *feme covert*, then and ever since until her decease having a husband, Edward Cornell, in full life, and that the said Ellen is now deceased, the Commonwealth offer to prove the declarations of the deceased Ellen Cornell, made at the time of the birth of the child, as to who is the father of the child, and that the deceased being conscious of approaching death persisted in the truth of such declarations.

To the reception of this testimony defendant's counsel object.

1. Because the deceased being a *feme covert* does not come within the provisions of the Act of Assembly regulating the manner of proof in such cases: Criminal Code of 1860, § 37.

2. That this being only a misdemeanor, death-bed declarations as to who committed the offence are not competent, such evidence being admissible only in cases of homicide.

Objection sustained.

3. Death-bed declarations made by a person, who if living would not be a competent witness, cannot be given in evidence, and a wife being an incompetent witness to prove non-access on the part of the husband, whether the action be civil or criminal, or whether the proceeding is one of settlement or bastardy, the testimony of the dying declarations of Ellen Cornell are incompetent and cannot be received.

Sustained.

The court, Johnson, J., sustained the objections and rejected the evidence.

The Commonwealth called Edward Cornell, the husband of Ellen Cornell, the mother of the alleged bastard child, and offered to prove by him that he was absent from home and in the United States navy, and did not see the said Ellen for twenty-two months next preceding the birth of the child.

Defendant objected to the admission of this evidence, on the ground that the presumptive father was not competent by his testimony to bastardize his issue.

The court sustained the objection and rejected the evidence.

Commonwealth v. Shepherd, 6 Binn. 283.

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*In the Supreme Court of Pennsylvania.*

ROSS & McCOMBS v. LYNCH & RUSHTON.

(Vol. XI., p. 169. 1863.)

1. The real estate of a married woman, bought with her separate funds and deed taken in her own name, cannot, under the Act of 1848, be seized and sold for her husband's debts, and a purchaser at such sale takes nothing.
2. Where a married woman's mortgage, voluntarily made and for her own benefit, was defectively acknowledged, but when she and her husband were served with the *scire facias* issued thereon, they did not appear to defend it, and suffered judgment to be entered against themselves, a *levari facias* to issue, a sale to be made and a sheriff's deed delivered without remonstrance, she could not afterwards take advantage of the defect. She is concluded by the judgment on the *scire facias*.
3. The judgment remaining unreversed, cannot be questioned collaterally in another action.
4. Parties in possession of the real estate, under sheriff's sale for the husband's debts, are not terre tenants and entitled to a day in court as to the judgment on the *sci. fa.*

ERROR to the District Court of Allegheny county.

*Woods*, for plaintiff in error.

*Hasbrouck*, for defendant in error.

The opinion of the court was delivered October 26, 1863, by  
WOODWARD, J.—The plaintiffs claimed title to the lot in question through Mrs. Agnes Wilson; the defendants, through her husband, Mr. J. W. Wilson. But as Mrs. Wilson had bought the lot with her separate funds and taken a deed in her own name, it is manifest the defendants took nothing by the subsequent sheriff's sale of it on execution against her husband, for,

under the Married Woman's Act, her estate could not be seized and sold for his debts. In possession, however, under such a sale, the defendants insisted that the plaintiffs on the record had no right to oust them, because they, the plaintiffs, derived their title through a sale on a mortgage of Mrs. Wilson, which had not been executed in due form of law.

Her mortgage, though voluntarily made, and for her own benefit, was defectively acknowledged; but when she and her husband were served with the *scire facias* that was issued upon it, they did not appear to defend it, and suffered judgment to be entered against themselves, a *levari facias* to issue, a sale to be made to the plaintiffs, and the sheriff's deed to be delivered, without a syllable of remonstrance. Indeed, it is alleged that Mrs. Wilson refuses still to complain of the defective acknowledgment of her mortgage, or to claim any benefit from that circumstance.

If she were less honest than she is, she could not now take advantage of the defect. She is concluded by the judgment on the *scire facias*. That was a judgment of law that her estate in the mortgaged premises should be sold, and so long as that judgment remains unreversed it is not to be questioned collaterally in this or any other action.

In *Warder v. Tainter*, 4 Watts 274, the mortgagor was dead before the first *scire facias* issued, but after two *nihils*, the judgment was held to be regular and sufficient to pass a valid title to the land. In *Miner v. Graham*, 12 Harris 494, a married woman who had had no personal notice of the proceedings against her on her mortgage, was endeavoring to escape from the effect of a judgment after two *nihils*, on the ground of a defective execution of the mortgage, but this court held her concluded, and Judge Lewis disposed of the main point of the present case by his remark that "after judgment on a mortgage, its execution in due form of law is a matter adjudicated."

The general doctrine that the judgment or decree of a court of competent jurisdiction cannot be reversed or inquired into in a collateral proceeding, except for fraud, was distinctly reasserted in respect to proceedings both *in rem* and *in personam* in the recent case of *Yaple v. Titus*, 5 Wright 195.

From the doctrine of these cases, and many more that might be cited, were it necessary, it is apparent that the judgment that

was rendered on Mrs. Wilson's mortgage, could not be impeached in this collateral manner, even if she had not been personally served, and were now, herself, resisting the judgment. But if she could not impeach it, how much less the creditors of her husband or their vendee? What pretence of right can they have to go back of a judgment conclusive against her, to set up a defence in her behalf which she would not set up?

They say they are terre tenants and therefore entitled to their day in court. But they are not terre tenants, for they are utter strangers to Mrs. Wilson's title. Neither their purchase of the husband's interest in the lot, nor their possession, makes them terre tenants in respect of her title. Again, they say that as defendants in ejectment they are at liberty to show title out of the plaintiffs. Undoubtedly. But they do not show title out of the plaintiffs by pointing to the defective acknowledgment, for that is cured by the judgment on the mortgage. This was the attempt that was made in *Warder v. Tainter*, and *Miner v. Graham*, but it must fail here as it did in those cases. For the purposes of the judgment on the mortgage, Mrs. Wilson's acknowledgment was perfect. The law having so adjudged it once, nothing but a writ of error to that judgment can change it.

As an abstract principle, it is undoubtedly true, that a married woman's mortgage is of no validity without due acknowledgment, but the principle is incapable of application to the facts of this case. It is excluded by the conclusiveness of the judgment on the *scire facias*.

Finally, it is argued that judgment in *scire facias* sur mortgage creates no new lien, and if the mortgage were not duly acknowledged, it gave none. Be it so. It is not on the law of lien that we rule this case. Whether the mortgage were ever a lien or not, the law adjudged it to be so, and ordered the premises to sale to satisfy it, and until that judgment is vacated or reversed, it excludes this suggestion as well as every ground of defence that was set up.

The judgment is reversed and a *venire facias de novo* is awarded.

STRONG, J., dissents.

*In the District Court of the United States for the Western  
District of Pennsylvania.*

UNITED STATES v. MONONGAHELA BRIDGE COMPANY.

(Vol X., p. 169. 1863.)

1. Act of Congress of 17th July, 1863, construed.
2. Bridge, railroad and passenger railway companies may issue tickets, "good for one trip," without violating the provisions of the act.
3. These tickets are not designed to supplant the circulating medium, but are matters of convenience, equally to the passenger and the companies.
4. If they bore any resemblance, or similitude to the coin of the United States, or the postage currency authorized by Congress, or if the purpose indicated upon their face, was to cause them to circulate as money, the corporation issuing them, would be amenable to the penalties of the act.

THIS case together with the cases of the *United States v. The Allegheny Bridge Company*, and the *Northern Liberties Bridge Company*, was argued by *Bakewell*, *Loomis* and *Shaler* for the defendants, and by *Carnahan*, U. S. Attorney, for the Government.

Opinion of the court by

MCCANDLESS, Dist. J.—The question raised by the demurrer is, whether these corporations are liable to the penalty under the provisions of the Act of Congress of the 17th July, 1863, for issuing paper tickets to be received for toll. The indictment charges that the defendants "did issue, circulate, and pay divers checks, memoranda, and obligations, each for a sum less than one dollar, intended to be received and used in lieu of the lawful money of the United States." The tickets are described as having printed on their face "Monongahela Bridge—Good for one trip," with the name of the collector of tolls added. We do not think that this is a violation of the Act of Congress. Unlike the tokens recently issued by the merchants of this city, and for which penalties have been imposed by this court, these tickets have no resemblance or similitude in shape, design or material to the coin of the United States, nor to the postage currency, the free and untrammelled circulation of which it was the design of the act to advance and protect. They cannot even be dignified by the name, given in anything but polite phrase—

ology, to the worthless issue of rotten boroughs, which in our past history flooded the country, and against a renewal of which the prohibitions of this act are directed. They do not contain a promise to pay the money, they are not the representatives of money, and therefore cannot be said to circulate, or be intended to circulate as money. Money is the medium of exchange among the people. Its peculiar characteristic is, that it is the one thing acceptable to all men, and in exchange for which they will give any commodity they possess. The power to make it is an exclusive attribute of sovereignty, no difference of what material it may be composed. It may be of the precious or the baser metals, or it may be of paper, provided it has the stamp of the sovereign authority. Any infringement of this supreme prerogative is visited with merited punishment by all nations that claim to have organized or well regulated governments.

What are these tickets but a mere permit to pass on the defendant's bridge, the printed evidence that the holder has the right of way over a public thoroughfare for a given distance? Their exclusion would subject to the penalties of this law, all railroad and passenger railway companies which issued tickets, as well for the convenience of the public as for their own protection. No passenger is bound to receive them, nor should they be tendered, except during periods when there is great scarcity of the smaller coin of the United States, and when the exchange is a mutual accommodation to the passenger and the collector. As every passenger is bound to pay his toll, and in the lawful circulating medium, the embarrassment is more frequently with him than with the company. But as the latter enjoy a monopoly of the particular highway, it is their duty so to use their franchise as not to put the public to unnecessary inconvenience. The grant of corporate privileges is for the public good, and from our knowledge of the gentlemen having the management of these companies, we are satisfied they entertain no desire to abuse them. They have an interest in common with the community in preserving the purity of the currency, and a departure from this policy would only react on themselves.

Let judgment be entered for the defendants on the demurrer, the costs to be paid by the United States.

*In the Court of Common Pleas of Allegheny County.*

LUCESCO OIL CO. v. PENNSYLVANIA RAILROAD CO.

(Vol. XI., p. 177. 1863.)

1. A bill of lading is a contract which must be construed by the court like any other written contract, according to its true meaning.
2. Common carriers may limit their liabilities by special agreement.
3. Where a car containing oil was thrown from the track through the breaking of an axle, and while remaining where it was left after the accident, two men came along, and out of curiosity drew a match across the car to test whether the freight was oil or whiskey, and the oil ignited and an explosion occurred by which the oil was destroyed, it was held that although the accident arose from a crack in the axle which it was "impracticable" to discover, if the agent of the company who had tested the axle had used reasonable care under the circumstances, and otherwise reasonable care had been used, the plaintiff was not entitled to recover.
4. Where the car containing the oil had remained standing where left after the accident, for some time, and was destroyed as stated above, if reasonable care under the circumstances had been used in the preservation of the oil, the plaintiff was not entitled to recover.
5. The measure of damages for oil lost by neglect of carriers is the value at the nearest practicable market, with freight thereto deducted from, and interest added to the net value from the time of accident to the time of decision.

*Robb & McConnell*, for the plaintiffs.

*Hampton*, for the defendants.

The facts are sufficiently stated in the charge of the court, delivered as follows, by

STOWE, A. J.—This is an action brought by the plaintiffs to recover from the defendants the value of a lot of oil and benzine, which was shipped over the railroad and destroyed near Lancaster by reason of the train of cars being thrown from the track and by fire.

The counsel for each of the parties have presented a number of points, upon which we are requested to instruct you, which seem to cover every question which can possibly arise in your examination of the facts of the case, so fully that I shall content myself by simply answering those only, adding what may be



necessary to bring the matters involved in the evidence more particularly to your notice.

*Plaintiff's points.*—The plaintiff's counsel asks the court to charge the jury as follows :

1. That a bill of lading reducing the liability of a common carrier below that which the common law imposes upon him, if not absolutely void, is in derogation of that law, and must be most strongly construed against the carrier ; and he must show, by clear and satisfactory evidence, that his case comes within the terms of the bill so construed, in order to escape liability.

2. That an accident occasioned by the breaking of a cracked axle, where it was not "impracticable" to have discovered the crack before hand, is not an accident occasioned by an "unavoidable cause."

3. The evidence being that in nineteen cases out of twenty where axles break, they break close to the inside of the wheel, where the one in question broke, it was inexcusable negligence in the railroad company, not to be prepared with means to ascertain the soundness of axles at that particular place ; and it is no excuse to say that to make the examination would be troublesome and expensive.

4. That to run a train such as the one in question at the rate of fifteen miles an hour round a curve and over a high embankment, that being the greatest speed allowed for such trains anywhere on the road, was such negligence as will render the railroad company liable under the bill of lading.

5. That it was the duty of the railroad company in making up the train, to place the cars containing such inflammable articles as coal oil and benzine as far from the engine as possible, and that in placing the cars in question within one of the forward end of the train, the company were guilty of such negligence as will render them liable under the bill of lading.

6. That it was the duty of the railroad company to take strict care of the plaintiff's property, after the cars were thrown off the track, and if the jury believe that it did not so take care of it, or that any of its employees invited, or suggested to by-standers to carry it away, or permitted it to be set on fire, either by by-standers, or by fire from the locomotive, it was such negli-

gence as will render the railroad company liable under the bill of lading.

*Defendants' points.* 1. That if the jury believe from the evidence that the axle which broke had been inspected by Kinzer, the foreman of defendants' shop, before it left the shop, and that he used such reasonable care and foresight in making the examination to learn its condition, as might be expected from a person in his situation under all the circumstances of the case, and that no defect in it was apparent, and to all outward appearances it was sound, that then the accident may be considered as arising from "an unavoidable cause" under the bill of lading, and the plaintiff cannot recover.

2. That if the jury believe that the flaw in the shoulder of the axle was the occasion of its breaking; and the imperfection was not visible; and the foreman, Kinzer, by reason of its hidden situation, could not discover it after careful examination, and there was no reasonable ground for him to apprehend that it existed; that the defendants are not liable for the loss to the plaintiffs consequent upon the axle giving way.

3. That to entitle the plaintiff to recover, the jury should be satisfied from the evidence that the defendants negligently omitted to take such precaution to insure the safety of the axle as might reasonably be expected from the evidence of a fair degree of discretion and an ordinary knowledge of business.

4. That if the jury believe from the evidence that the barrels of oil and benzine were thrown down into the meadow by no negligence of the defendants, and whilst remaining there were shortly afterwards set on fire by persons other than the employees of the company, and consumed; that in the loss thereby occasioned, the defendants are not liable.

*Answer to plaintiff's points.*—1st point. We cannot affirm this point exactly in the form in which it stands.

The bill of lading in this case is the contract of the parties, and must be construed fairly and in accordance with its true meaning, so far as the same is according to law. In this state the law is now well settled that common carriers may limit their common law liability by special agreement, and when the agreement is in writing, it is for the courts to construe it, and instruct

you as to its legal effect. This having been stated to the jury, they apply the law to the facts, as in other cases.

You must be satisfied by the evidence that defendants' case comes within the terms of the bill of lading or contract, as interpreted by the court, to enable him to escape his *primâ facie* liability, arising from the delivery of the goods of plaintiff, and its non-delivery.

2d point. This point is answered in the negative.

The law is that the agents of defendants were bound to satisfy you that they had used reasonable and proper care and skill in making their examinations of the machinery used by them upon the road.

Was the examination such as was proper, reasonable and ordinarily skilful, under the circumstances of this case, as shown by the evidence? It would be practicable (using the word in its strict sense of "capable of being done by human means") to take the engine to pieces every time it comes to the end of a trip, but it is very clear that such would not be reasonable. The meaning of the word "impracticable," as used by the witness, is for you.

8d. Refused.

4th. Refused. The question is one of negligence or want of due and proper care by defendants in running the train, as shown by the evidence, and is entirely for you under all the facts in the cause.

5th. The question suggested in this point is also one of fact for the jury. We merely instruct you that it is the duty of the defendant to place the several cars in such location as would ordinarily tend to the greatest security of the train.

The question, however, is immaterial in the consideration of this case, unless you are satisfied from the testimony that the location of the cars in the train contributed to produce the loss, viz.: either the throwing of train from the track or the fire which followed.

6th. This point is affirmed, changing the term "strict care" to "reasonable and proper care," and stating that as the loss did not occur by reason of any one carrying oil away, the statement of witness in reference to that matter, is immaterial, except as it

may tend to show the amount of care taken of the oil after the train left the track.

The question is, did defendants' agents take proper and reasonable care of the oil at the time? It is certain that some one might have remained there and kept intruders away.

The accident, so far as the fire was concerned, might possibly have been prevented if the loss was occasioned by some one going there and firing it. Was it want of care not to do so? If it was, defendants are liable for the loss occasioned thereby.

This is solely for you under the evidence.

*Answer to the defendants' points.*—1st, 2d and 3d points are in substance the same, and have been already answered substantially in our replies to plaintiffs' points.

The first we affirm, if you find that Kinzer, the witness referred to in this point, was ordinarily competent and skilful to do what he undertook to do in inspecting or examining the road—worthiness of the engine and tender.

2d. Affirmed, subject to qualification as to first point.

3d. Same as second.

4th. Refused.

The first question under the principles indicated in the foregoing answers to the several points, will be whether there was such care, diligence and due regard to the duty of defendants, in reference to the subject-matter of controversy, as rendered the loss occasioned by the breaking of the axle and by fire, such as in your opinion could not have been prevented by ordinary skill, attention and foresight on the part of defendants' agents; or in other words, that the accident and subsequent loss was unavoidable, by the ordinary exercise of such human care, skill and foresight as was usual and proper for guarding against it, taking all the circumstances together. If so, plaintiff cannot recover in this case.

If you think that such was not the case, that is, if you find that the accident (the breaking of the axle), resulted from the want of ordinary and proper care on the part of the defendants, plaintiff is entitled to recover the whole amount of the loss he has shown by the evidence to have sustained.

But if you should be of opinion that the original accident

occurred without any negligence or want of care of defendants' agents, the railroad company will not be liable for the damage done directly by reason of the cars being thrown from the track, and you will then proceed to consider whether they used such further care, diligence and caution as was under the circumstances ordinarily necessary to protect the oil from being lost or destroyed by any person or by whatever cause, after the cars were thrown from the track.

Here, you must look at the time of day or night, the other necessary duties of the agents at the time, in relation to other trains which might be in danger of colliding with this one, the nature of the goods thrown out, or put in jeopardy by the accident; and in short, everything which under the evidence, goes to indicate what was ordinarily necessary to preserve the oil.

If you find that defendants' agents exercised all the care and caution, proper and ordinarily necessary to protect the oil from being lost, then plaintiff cannot recover for the loss occasioned by the firm; but if you find otherwise, then your verdict should be for plaintiff, and for whatever the loss thus occasioned was. What it may have been in such a view of the case, you must get from the evidence as best you may. It is obviously not very clear, but you must do with it the best you can.

If you come to the question of damages, you will take the amount of loss in quantity of oil, according to the view you may take of the evidence under our instructions on the law, and multiply it by the value of the oil in gallons or barrels at Philadelphia, the nearest practicable market. In estimating the value of the oil, you will take the value of free oil, or oil subject to the tax, and not oil in bond. That is to say, the value of oil in open market in Philadelphia. From this deduct freight to Philadelphia, and add interest from time of loss, to this.

Express Company v. Sands, 5 P. F. Smith 140; Farnham v. Camden and Amboy Railroad Company, Id. 53; Wolf v. W. U. Telegraph Company, 12 Id. 83; Empire Transportation Company v. Wamsutta Oil Refining and Mining Company, 13 Id. 14.

*In the Circuit Court of the United States for the Western District of Pennsylvania.*

EVANS v. THE CLEVELAND AND PITTSBURGH RAILROAD CO.

(Vol. XI., p. 193. 1864.)

1. The Cleveland and Pittsburgh Railroad Company had full power to execute a contract guaranteeing the punctual payment of the coupons attached to the bonds of Allegheny county, which were given by the county in payment of her subscription to the capital stock of the railroad company.
2. The bonds and coupons being made payable to bearer, they pass by mere delivery, and no assignment is necessary to enable the holder to sue.
3. The contract being made in Ohio, to be executed in New York, and by the laws of both those states, such a contract being an original undertaking, in order to maintain an action on the guaranty, it is not necessary for the holder to sue the county of Allegheny in the first instance, or pursue it to insolvency; nor is any demand or notice required.
4. The courts of the United States receive the statutes and judicial precedents of the different states as evidence of the law of each state without special plea or proofs of witnesses.

THIS was an action of debt, brought to recover the sum of \$15,000, for over-due coupons on the bonds of the county of Allegheny, guaranteed by the Cleveland and Pittsburgh Railroad Company. The coupons were in the usual form. The contract of the defendants was endorsed on the bonds, and read as follows :

“Office of the Cleveland and Pittsburgh Railroad Company,  
“Cleveland, Ohio, October 20, 1853.

“For value received, the Cleveland and Pittsburgh Railroad Company assign the within bond to ———, bearer, and guarantee the punctual payment of the interest thereon, as it may fall due, at the place and time specified.

“By order of the board of directors of the said company.

“CYRUS PRENTISS, President.”

The coupons were made payable semi-annually, on the 15th day of March and September, at the office of the Ohio Life Insurance and Trust Company, in New York.

The case arose on a demurrer to the plaintiff's declaration, and was argued by *John C. Knox*, of Philadelphia, for plaintiff,

and by *W. S. C. Otis*, of Cleveland, and *A. W. Loomis*, of Pittsburgh, for the defendants.

The points made by the defendants' counsel were: 1st. That the company had no power to execute the contract of guaranty. 2d. That due diligence had not been used to enforce payment against the county. 3d. That suit would not be upon the guaranty in the name of the holder of the bonds.

The answers to these points by the plaintiff's counsel were: 1st. That the presumption was in favor of the authority of the board of directors to execute the guaranty. 2d. That the contract was made in Ohio, to be executed in New York, and that by the laws of both of these states such a contract is an original undertaking, upon which the company was liable to be sued on non-payment of the interest at the time and place specified, and therefore the plaintiff was not bound to proceed against the county in the first instance. 3d. That the guaranty was to "the bearer" of the bonds, and that he alone could maintain the suit.

The following opinion was filed by

GRIER, J.—First, as to the power of the corporation to make the contract on which this suit is founded.

It is not necessary to notice the many metaphysical platitudes to be found in the books, by which corporations were wont to evade responsibility for their acts. Their powers will be strictly construed as between themselves and the state. But modern corporations are but partnerships, where the individuals are too numerous to act in their own names. They may make contracts and bind themselves in their corporate name on any subject necessary to the object of the association. Without noticing the extensive powers given by the act of incorporation, it is plain that a railroad must have power to contract with operatives, to bind themselves to pay money, to raise funds by borrowing and otherwise. It is only when called upon to pay their obligations that the conscience of a corporation (if they can be said to have any) suggests these astute doubts as to their power to contract.

This corporation had given certain shares of stock to the county of Allegheny in exchange for their bonds—a contract

which the two corporations were authorized to make. But county bonds are not money, and railroad companies must have money to make their roads. Whatever the wealth and respectability of the citizens of that county may have been, and their plenary ability to pay the bonds in question, those who purchased them might well doubt their punctuality. But a few years before this transaction, the executive officers of the county neglected or refused to collect taxes sufficient to pay the current expenses of the county, and with an utter disregard of the laws of the land, they flooded the country with an illegal and irredeemable currency. The citizens who were thus relieved from paying their taxes by this scheme, kept the currency afloat by common consent, without regard to the law. However unjust the suspicion might have been as regards very many of the respectable citizens of the county, a purchaser of their bonds might well doubt the punctuality of the payment of the interest, if not dishonest attempts at repudiation of the principal. Hence, if the railroad desired to raise money by putting those bonds into the market, it was their interest to give them all possible credit. That for this purpose, they might make this contract of guaranty, cannot be doubted, if they could make any binding contract at all.

What is the meaning of this contract?

It is to "guarantee to the bearer of the bond the punctual payment of the interest thereon, as it may fall due at the time and place specified."

The intention of the parties should govern in all contracts. There is no magic in any particular word used, which might be so defined by grammarians or judges as to make the contract an absurdity. These bonds were payable to bearer, and passed by mere delivery. They required no assignment to satisfy the requirements of any state statute, or to enable the holder to sue on them in his own name.

They are a species of commercial securities introduced into this country. They are construed according to the commercial usages of the world. By the custom of all civilized nations, and for the benefit of commerce, confirmed by judicial decisions of every nation and state, they have received such construction as



will most enhance their commercial value. It is vain for any judge or court to stand up, with Blackstone in hand, and attempt to arrest the will of all the rest of the world by the application of obsolete doctrines to a new species of security. There is no reason, founded in policy or morality, why a state or other corporation may not bind themselves to pay to bearer, both principal and interest, by instruments under seal. To construe the contract of defendants to be a mere warranty of the solvency of the county of Allegheny, would be no better than a mere stultification of the parties to it. What the parties evidently meant was an additional security for punctuality of payment of the interest, on the day and at the place mentioned in the bond. If the county has failed to have funds ready at the time and place, then the covenant of defendants is broken, and an action lies thereon.

It is not necessary to notice the various decisions of the Pennsylvania courts, as to their construction of such a covenant. The contract is made in Ohio, to be executed in New York, where the law is not hampered by judicial decisions which would compel a construction of a contract directly contrary to the plain intention of the parties. The contract is "with ——— or bearer." If necessary, the plaintiff might insert his name in the blank. He does not sue as assignee of the bond, under the peculiar statute law of the state of Pennsylvania, or any other state. The plaintiff declares on an original contract made with himself. No demand or notice is necessary to create the liability of the defendants under this contract.

The courts of the United States do not require the common law, as received in each state, to be proved like those of China or Japan. Their statute books and judicial precedents are received as evidence without special plea or proof of witnesses.

The plaintiff is entitled to judgment on the demurrer. But the defendant has leave to withdraw his demurrer, and to plead issuably, if he sees fit. Otherwise, let judgment be entered for plaintiff.

*In the Supreme Court of Pennsylvania.*

WILLIAM E. DODGE ET AL. v. JOHN N. BACHE.

(Vol. XI., p. 257. 1864.)

1. An agent's liability to his principal for negligence by which a third person has been injured, is only contingent, while it is direct and certain to the party injured.
2. An action against the principal by the party injured is *res inter alios acta* as to the agent, and the record is not admissible in evidence against him, except as to the amount of damages.
3. Therefore the rule that excludes an agent from testifying for his principal in such an action, is not founded in clear reason, and should not be extended; and his testimony should not be rejected, except upon the *quantum* of damages, unless his liability over has been clearly proved.

BACHE, plaintiff below, was the owner of a number of saw-logs, lying in Pine Creek, a navigable stream and public highway, about four miles below Marsh Creek Pond. This pond was also on a navigable stream and public highway, and was kept up by Dodge & Co., plaintiffs in error, for the purpose of running the saw-mill thereto attached, and also for the purpose of a harbor for saw-logs. It was so constructed that about eight feet of head could be let off at once, thereby making a flood in the creek below. These logs were put into the creek for the purpose of being floated to a mill about one mile below. McDougall was the agent of Dodge & Co., and had the general supervision of their business about this mill and pond, and had notice that these logs were in the creek below, and liable to be washed away by a flood from this pond. He took no precaution to guard against it, but let the pond off without any notice to Bache, and washed the logs away. Thereupon Bache brought his action on the case against Dodge & Co., for the negligence of their agent McDougall.

On the trial, defendants offered the deposition of McDougall, the agent, showing that the act complained of was not done by him. To this offer plaintiff objected, on the ground of interest in the witness, and the court sustained the objection. This is the point assigned as error in this cause.

*Pierce and Wilson*, for plaintiffs in error.—The deposition

of McDougall was rejected upon the ground that he was interested in the event of the cause. A recovery against the defendants below would not necessarily have entitled them to a recovery against him. To exclude his testimony, the plaintiff must make out a case for the defendants against him: *McCreedy v. The Schuylkill Navigation Co.*, 3 Whart. 441; *Smith v. Seward*, 3 Barr 842.

*Henry Sherwood*, for defendant in error.—The deposition of McDougall went directly to throw the responsibility off the shoulders of the witness and put it on to others, and thus relieve himself of all responsibility to his principals, the defendants below. For this purpose he is not a competent witness: 1 Stark. Ev. 149; 1 Greenl. Ev. 540, § 417; *McDowell v. Simpson*, 3 Watts 185; *Juniata Bank v. Beale*, 1 W. & S. 229; *Plumer v. Alexander*, 2 Jones 81; *Dorrance v. Commonwealth*, 1 Harris 160, 165; *Schuylkill Co. v. Harris*, 5 W. & S. 28; *Orphans' Court v. Woodburn*, 7 Id. 166; *Gilpin v. Howell*, 5 Barr 51.

The witness was not released. He was not a competent witness until he was. The declaration charges the negligence of the witness while acting as the agent of the plaintiffs in error. That negligence was the gist of the action; the evidence sustained the declaration.

The opinion of the court was delivered by

STRONG, J.—The rule which excludes an agent from testifying for his principal, in actions brought against the principal for alleged negligence of the agent, though recognised in many cases, is not founded in clear reason. He is held generally incompetent, because, in the event of a recovery against his principal, he would be liable over, and the judgment recovered would be admissible in evidence against him. His liability to his principal is, however, but contingent, while it is direct and certain to the party injured by his negligence. Satisfaction recovered from his principal exonerates him from this certain liability, and leaves his responsibility over still only contingent. But it is said the judgment against the principal is admissible in an action which he may bring against the agent. Why it should be, it is hard to see. The agent is not

a party to it nor a privy. He had no right to conduct the defence, to call witnesses, or to interfere in any manner between his principal and the party injured. Why then should he be affected by a record that is wholly *res inter alios*? Yet such a judgment is undoubtedly held to be evidence against him, not evidence to establish his liability, but admissible to show the *quantum* of damages. His liability must be shown by other proof. The questions whether he was negligent, and whether the injury for which satisfaction was recovered from the principal, was a consequence of his negligence, remain open, and are not solved in any degree by the record. Notwithstanding, then, a recovery against the principal, it may be that the agent is not responsible over to him, and at most it would seem his testimony for the principal should be rejected only when offered to reduce the estimate of damages.

Based upon reasons so unsatisfactory, this rule of exclusion should not be extended. The testimony of the agent should not be rejected unless his liability over has been clearly proved. It is not to be assumed by the court. The general presumption is that every witness is competent, and it is incumbent upon the party who objects to him to show a clear disqualification.

In such a case as this, he must show not only that the act complained of was negligence, but that it was unmistakably done by the witness whom he seeks to exclude. Until this has been shown, no interest, certain or contingent, is made out.

Turning now to the case in hand, it appears to have been an action to recover damages for an injury alleged to have been caused by the negligence of the defendants. The act complained of was opening their dam at Marsh Creek Mill, thereby causing a flood in the stream which carried away the logs of the plaintiff. The main questions were whether the dam was opened at the time when the logs were lost, and, if it was, by whom it was opened. Two counts in the plaintiff's declaration aver that it was done by McDougall, an agent of the defendants. On the trial, after the evidence of the plaintiff had been submitted, the defendants offered the deposition of McDougall, to show that the water in the dam was not opened by him, but the court rejected the deposition on the ground that the witness was interested. This was assuming that he was liable over to the defendants in

case of a recovery by the plaintiff. But how did that appear? Clearly he was not if he did not open the dam, even though it may have been opened by others. The fact that he was an agent is nothing, if he was not an active agent in the act complained of. The averments in the declaration amount to no proof of his agency. If they did, it would often be in the power of a party, at his own pleasure, to exclude the most important witnesses of his adversary by simply averring an agency. And in examining the testimony submitted by the plaintiff, we find no evidence that the dam was opened by McDougall, or in pursuance of his orders. There is hardly any evidence that it was opened at all, at the time when the plaintiff's logs floated away. Certainly there is nothing to sustain an averment that the witness would be responsible to the defendants, if the plaintiff should recover. In rejecting the deposition, an interest in the witness was assumed without proof, assuredly without such clear proof as the law requires to justify setting aside a witness as incompetent. There was error, therefore, in rejecting the deposition.

And the error was the more palpable when the deposition was offered in connection with evidence that McDougall had been directed by his principals to open the pond and let off the water whenever there shall be water enough to float logs to a lower mill. Such a direction tended to show that he would not be liable to his employers even if he did open the dam, and therefore raised a presumption against the existence of any interest.

Judgment reserved, and a *venire de novo* awarded.

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*In the Supreme Court of Pennsylvania.*

• CUMMINGS'S EXECUTORS v. MEAKS.

(Vol. XI., p. 291. 1864.)

Plaintiff below, the housekeeper of defendant's testator, after testator's death, delivered to defendant a box containing a sum of money. She subsequently claimed the money as hers by virtue of a gift from testator, and after demand and refusal brought trover and conversion therefor against the executor. Held,

1. That, under the circumstances, clear and satisfactory proof of the gift and of delivery in pursuance of it is requisite.
2. That where an alleged error consists in the submission of a question of fact, without adequate evidence, the plaintiff should obtain from the judge a bill of exceptions containing all the evidence which was submitted to the jury on the point; and when the plaintiff neglects this duty, the rule "*Omnia præsumuntur*" will be applied against him.
3. The loose character of the present mode of bringing evidence before the Supreme Court condemned, and the suggestion made that the evidence appropriate to the questions to be decided, be settled before the judge after trial, on notice to the opposite counsel, and by him certified under his hand and seal.
4. A demand upon and refusal by an executor to deliver up a specific article, which came to his hands lawfully, will not sustain an action of trover against him as executor.

ERROR to Common Pleas of Fayette county.

*Veech* and *Gilmore*, for plaintiff in error.

*Ewing, contra.*

The opinion of the court was delivered January 4, 1864, by

WOODWARD, J.—This was an action of trover and conversion by Sarah Meaks, to recover from the defendant, as executor of John Cummings, deceased, the sum of \$350. The money was contained in a little tin box, which Mrs. Meaks, as housekeeper of Cummings, delivered after his death to the executors. Subsequently to this she set up a claim to the money as her property, by virtue of a gift from Cummings, and having caused a demand to be made upon the executor to return it to her, this suit was brought, and the neglect to comply with her demand was the evidence of wrongful conversion.

Two points of defence were taken, first, that evidence of the gift should be "most clear and satisfactory," and secondly, that there was no evidence of conversion.

We agree with the learned judge, that clear and satisfactory evidence of the gift and of the delivery in pursuance of it, would be enough without the superlative adjective insisted on by counsel, but we can find no such evidence in our paper books. When a housekeeper undertakes to recover back from the executor of her deceased employer, money found in his house and voluntarily

delivered by herself to the executor for purposes of administration, she ought to come well armed with clear and satisfactory proof of her title. Assuredly all presumptions are against such a plaintiff. And if the court submitted such a question without adequate evidence, it was error. Whether we have the evidence on which the court submitted the case, the record does not inform us.

We are at a loss how to deal with this part of the record, for we are not sure that all the evidence has been sent up. None of it is certified, and possibly all that was sent up has not been printed in our paper books. Perhaps our safest course in such circumstances is to apply the rule of *omnia præsumuntur*. It is the business of the plaintiff in error to prove errors, and where the alleged error consists in submitting a question of fact without adequate evidence, he should obtain from the judge a bill of exceptions, containing all the evidence which the judge submitted to the jury on the point. When a plaintiff in error neglects this duty, which is the only legitimate mode of making the evidence a part of the record, we will presume, as we do in this case, that all things were rightly done in the court below, and that no question of fact was referred to the jury without appropriate proofs.

The unpardonably loose practice we condemn is not peculiar to this case, but prevails to a great extent throughout the state. Counsel seem rarely to advert to the legal rules for placing evidence upon the record. Sometimes they print what is called the judge's notes, though it is not his duty to take notes of the evidence; in many cases he does not pretend to, and even when he does, they are not always full. Sometimes counsel on each side furnish editions of the evidence from their own notes, and then vex our ears with disputes about what was proved and what was not proved. It is time we should be done with such annoyances. When the questions to be reviewed depend on the evidence in the cause or any part of it, let the evidence appropriate to the questions be settled before the judge, after the trial is over, on notice to opposing counsel, and let the judge certify that as the evidence under his hand and seal. In this manner it is regularly brought upon the record, and assignments of error founded upon it become intelligible.

The second question, in regard to conversion, stands on a different footing. The judge recites the evidence which he ruled to be sufficient to work a conversion. This enables us to review his opinion on this point.

It would seem that after the plaintiff below had delivered the box containing the money to the executor, he placed it in the Brownsville Bank, and subsequently paid it over to Taylor, the guardian of the only child of the decedent. Whilst the money was in the bank, and before it was paid over, Bailey, as the agent of Mrs. Meaks, called on McKinley, one of the executors, and presented a written memorandum of the amount of the money, and demanded it for her. "He declined to pay it till he would see further about it." This was held to be a conversion.

We are unable to concur in this opinion. Supposing the plaintiff's title to have been established, of which, as I have said above, we have no evidence, here was a delivery of the money to the executors for purposes of administration. It could have been delivered to them for no other purpose. It was in *custodia legis*. The payment over to the guardian was due administration of the fund. Both executor and guardian held it under legal trust for third parties, and how could they comply with such a demand as Mrs. Meaks made, without violating their trusts? If personal representatives are to be exposed to an action of trover and conversion by every person who sets up a claim to chattels that have passed into their hands for purposes of administration, they would be overwhelmed with litigation, and legal administration would be rendered impossible. McKinley's possession of the money was lawful, or to say the least, it was not wrongful. Where such is the case, it is well settled that demand and refusal are not conversion, but only evidence of it. Wrongful or illegal taking or appropriation of another's property, constitutes conversion, for which an action lies without previous demand, but where the possession is rightfully acquired, demand and refusal are evidence of a wrongful detention, and if not countervailed by other circumstances, are sufficient to support the action. The countervailing circumstances in this case, are those above adverted to—lawful possession by personal representatives for purposes of administra-



tion—and we think them sufficient. Indeed, we do not see how the executor could have answered the demand more properly.

If an executor get lawful possession of my horse, and refuse, on demand, to deliver him, doubtless I may sue him in trover, but not in character of executor, for in his representative character he is liable only for the torts of the testator. And not even for all of them, because mere personal torts, like assault and battery, slander, or false imprisonment, that bring no increase or advantage to his estate, die and are buried with the decedent; but for such as add to and increase his estate, the executor is liable. But suppose the horse, lawfully in possession of the decedent, at his death passes into the hands of the executor, with the other goods of the estate, will trover lie against the executor, after demand and refusal? Here there would be no tort of the decedent to charge against the executor, and if any tort by the executor, it would consist in not delivering over, on demand, property found in possession of the decedent. The title of the demandant would have to be investigated and decided by the executor at his peril. In 2 Wms. Ex. 1565, and in *Hench v. Metzgar*, 6 S. & R. 272, and perhaps in other books, Lord Mansfield is represented as having ruled in the leading case of *Hambley v. Watt*, Cowper 371, that trover will lie against an executor, if the property came into his hands in specie from the testator, and the conversion be laid as committed by the executor. I have examined that case carefully, and whilst some of the interlocutory observations of his lordship do suggest such a rule, the plaintiff's remedy was put, in the final judgment, upon an action for money had and received.

Whatever we might consider the law to be in respect to a specific chattel, that had no marks to identify it, we think there is no authority for an action of trover to recover from an executor money of which his testator died possessed, and where the only evidence of conversion by the executor consists in refusing to pay it to a claimant on demand. The law entrusted this money with the other goods to the executor, to be administered, and the law would be inconsistent with itself, if it made his custody tortious. If any executor could be put to investigating his title to goods in possession, the law would scarcely require this ex-

ecutor to doubt his testator's title to a sum of money, which the plaintiff herself handed over as part of his estate. As to her, at least, there was no tort in administering that fund according to law. The judgment is reversed.

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*In the Supreme Court of Pennsylvania.*

COMMONWEALTH v. CART.

(Vol. XI., p. 313. 1864.)

1. A delivery of horses to a horse-dealer, for sale, the proceeds to be returned to the owner, is not a bailment.
2. Therefore the 108th section of the Act of 1860, providing that "if any person, being a bailee of any property, shall fraudulently take or convert the same to his own use or to the use of any other person, except the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny, and punished as is provided in cases of larceny of like property," does not apply to such a case.
3. A count commingling two separate and distinct offences, the one felony and the other a misdemeanor, is bad.
4. A count charging misdemeanor, where all the other numerous counts charge felony, is bad, except in certain cases, *ex-necessitate*, where one offence is the result of or so intimately connected with the other as to render it impossible to ascertain of which offence defendant may be guilty, until the evidence be heard.

ERROR to Quarter Sessions of Cumberland county.

The facts are sufficiently detailed in the charge of the court below, as follows :

GRAHAM, P. J.—After the evidence was heard in this case, the defendant demurred to the same, as being insufficient in law to maintain the bill of indictment under the Act of Assembly, and the Commonwealth joined in the demurrer.

The evidence on part of the Commonwealth, which is not controverted, shows the following state of facts :

William Cart, the defendant, was engaged in the business of purchasing and selling horses. He was about going to Philadelphia with a lot of horses, when Andrew H. Blair, the prosecutor, delivered to him a horse which he was to sell for Mr. Blair, and

return him the price, after deducting expenses. After defendant went to Philadelphia with the horses, Mr. Blair sent him another horse to sell for him on the same terms. The defendant sold both horses and received the money. One was sold for \$100; the price for which the other was sold is not proved, but the evidence is that defendant said he had sold the other horse and had the money in his pocket. The proceeds of the sales have not been paid over by defendant to Mr. Blair.

There are six counts in the indictment, in all of which the defendant is charged with larceny as consignee and bailee under the 108th section of the Act of 1860, except the fifth count, which charges him with a misdemeanor as consignee and bailee of A. H. Blair, in converting to his own use \$180, money obtained for the aforesaid horses, sold by him as before stated.

The five counts charging defendant with felony and larceny, were doubtless intended to bring the case within the 108th section of the Act of 1860, which provides, "if any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or to the use of any other person, except the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny and punished as is provided in cases of larceny of like property."

In the construction of this section, it is necessary we should ascertain what the legislature intended by the term "bailee," as here used.

In Kent's Commentaries, 2d vol., p. 558, the following definition is given: "Bailment is a delivery of goods in trust, upon a contract expressed or implied that the trust shall be duly executed, and the goods restored by the bailee as soon as the purpose of the bailment shall be answered."

Under this definition five species of bailment are mentioned:

1. *Depositum*.—When goods are to be kept for the bailor, and returned upon demand without recompense.

2. *Mandatum*.—Which is when the mandatory undertakes gratuitously to do some act about the thing bailed, and is only responsible for gross neglect or a breach of good faith.

3. *Commodatum*.—Or loan of an article to be used for a certain time without pay for the use.

4. *A Pledge*.—Which is a delivery of goods by a debtor to his creditors to be kept till the debt is discharged.

5. *Locatio*.—Or hiring for a reward.

From this definition of bailment and the different kinds of bailment noticed under it, a horse dealer to whom a horse was delivered for sale, the proceeds of sale to be returned to the owner, could not be considered a bailee, for there was no contract for re-delivery of the property to the owner, or any person for him. On the contrary, it was delivered for the purpose of sale and a return of the price to the owner.

Story, in his Commentaries on the Law of Bailments, § 2, gives the definition of Sir William Jones, which is: "A delivery of goods on a condition express or implied, that they shall be restored by the bailor to the bailee, or according to his directions, as soon as the purpose for which they are bailed, shall be answered." But Justice Story says this definition is inaccurate in supposing that the goods are to be restored or re-delivered, and instances the case of a bailment for sale, as in the case of a consignment to a factor, no re-delivery is contemplated by the parties. Chancellor Kent refers to Mr. Justice Story applying the term bailment to cases in which no return or delivery or re-delivery to the owner or his agent is contemplated, and expresses his opinion that this is extending the definition of the term beyond the ordinary acceptance of it in the English law.

We have therefore a conflict between learned commentators on this subject, on the definition of bailment, and consequently the meaning of the term bailee, as used by our legislature. If it depends upon the meaning of this word, whether the defendant is to be sent to the penitentiary for horse stealing, or acquitted because he sold his neighbor's horse, at his request, and was unable or unwilling to repay him the price received, the humane principle of our criminal law, which says, it is better that ninety-nine guilty escape than that one innocent person should be punished, ought to induce us to adopt the definition of Sir William Jones and Chancellor Kent, and discard that of Mr. Justice Story, which so far as we have investigated the subject is unsupported by other commentators. Mr. Justice Blackstone, in his Commentaries, vol. 2, page 456, after enumerating many

different cases of bailment, all of which required a return or delivery by the bailee to the owner or his agent or appointee, remarks: "There is a special qualified property transferred from the bailor to the bailee together with the possession. It is not an absolute property because of his contract for restitution."

Thus showing that restitution was necessary to constitute the relation of bailor and bailee between the parties.

The Act of Assembly bears very satisfactory evidence that the intention of the legislature was, that the fraudulent conversion by the bailee must be of the property or thing delivered, for it provides "although he shall not break bulk or otherwise determine the bailment." But in this case the property was converted into money under the express terms of the contract when it was delivered. There was no fraudulent conversion by the defendant, of the property delivered to him by the bailor, but it was sold in pursuance of the instructions of the owner at the time of delivery. The parties to the transaction occupied more the position of principal and agent, or consignor and consignee, than that of bailor and bailee, if the terms consignor and consignee can with propriety be applied to transactions of this kind, where horses are delivered to a dealer to be taken to Philadelphia and sold, and the proceeds returned to the owner.

The legislature, in the 125th section of the same act, provided for the embezzlement of merchandise by consignees and factors, and which, by that section, is made a misdemeanor; showing that they intended to distinguish between bailees and consignees, and directed that the former should be guilty of felony for conversion of the property delivered to them as bailees, and the latter for the embezzlement of the proceeds of sales of merchandise consigned to them, are only guilty of a misdemeanor.

The fifth count in the indictment is intended to charge defendant with a misdemeanor, and charges him with being the consignee and bailee of Andrew H. Blair, and taking and converting to his own use one hundred and eighty dollars, which "money had before that time been raised by, and acquired by him the said William Cart, by the sale of certain other property, to wit" (describing the two horses delivered to him by Mr. Blair, and then continuing), "which had been before that time consigned to him

the said William Cart, as bailee, by the said Andrew H. Blair, to the great damage," &c.

Without inquiring whether the facts of this case would bring defendant within the meaning of the 125th section as "a consignee or factor having the possession of merchandise, with authority to sell the same," the count cannot be sustained, because it commingles two separate and distinct offences, the one a felony and the other a misdemeanor, in the same count. It charges defendant that he was both consignee and bailee of the prosecutor, and that he sold property which had been consigned to him as bailee of the prosecutor. As if to make assurance doubly sure, two separate and distinct offences are joined together. If he sold these horses consigned to him as bailee, he is guilty of a felony, and must be sentenced for horse stealing, under the provisions of the 108th section. If he only appropriated the proceeds of merchandise consigned him for sale, he is guilty of a misdemeanor, and must be sentenced under the 125th section: the charge ought to be clear, specific and intelligible. If the fifth count was intended to be drawn under the 125th section, it ought to set out distinctly, in the language of the act, that defendant had the possession of the property with authority to sell the same, that he did sell it, and fraudulently applied the money raised and acquired by such sale to his own use. But it is averred in this count, that the property had been consigned to him as bailee, and this negatives the authority to sell, for we have shown that the term bailee as used in the act, and defined by the best legal commentators, only applies to a person to whom property is delivered, to be redelivered to the owner or such person as he may direct.

Another objection to the fifth count is, charging a misdemeanor when all the counts charge a felony. A felony and misdemeanor cannot be joined in different counts in the same indictment, except in certain cases *ex necessitate*, where one offence is the result of or so immediately connected with the other as to render it impossible to ascertain of which offence defendant may be guilty, until the evidence is heard, as in the case of rape and assault and battery with intent to ravish.

For the reasons stated, we enter judgment for the defendant.

After argument in the Supreme Court, there was delivered the following:

PER CURIAM.—There is no error in this.

Judgment affirmed.

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*In the Supreme Court of Pennsylvania.*

GILMORE ET AL. v. ROSS.

(Vol. XI., p. 353. 1864.)

Where one died seised of real estate descended from her father, leaving as her nearest kindred her mother, a paternal aunt and maternal aunts and uncles, the paternal aunt alone is entitled, as next of kin of the blood of the ancestor from whom the estate descended.

ERROR to the Common Pleas of Fayette county.

The facts and points raised in this case are sufficiently set out in the opinion below.

*N. Ewing*, for plaintiff in error.

*Patterson & Parshall*, for defendants in error.

Opinion of the court delivered January 4, 1864, by

LOWRIE, C. J.—This estate descended to Mary Ann Gilmore from her father, and she died seised of it, leaving, as her nearest kindred, her mother, a paternal aunt, and two maternal uncles and aunts. The mother is now dead, and the paternal aunt claims the estate against the devisees of the mother, and recovered judgment in the court below.

The counsel on both sides have cited cases enough to support this decision; but the counsel for the defendants below think some of them erroneous, and therefore we appeal to the written law, the Intestate Act of 1833. Is this case specially provided for there? If not, it must fall under the general provision of section 11.

Of course, if the intestate had been the first purchaser of the

estate, it would, on her death, have gone to her mother in fee, under section 5. But section 9 declares that none of the previously enumerated cases shall include the case of a descended or devised estate, so as to transmit it to any who are not of the blood of the ancestor from whom the intestate acquired it, and this would exclude the mother for all but her life-estate. Is this one of the enumerated cases?

We think it is. One enumerated case is in section 6. "In default of issue and brothers and sisters of the whole blood and their descendants, and also father and mother, competent by this act to take an estate of inheritance therein," and leaving brothers and sisters of the half-blood and their issue; and then section 7 gives another case: "In default of all persons hereinbefore described, the real estate shall descend to the next of kin of such intestate," subject, however, to the condition in section 9, that they must be of the blood of the first purchaser.

But it is argued that there is no default under section 7, because the mother was living; and that, therefore, the case falls within section 11, and goes to the next of kin, irrespective of the line of descent from the first purchaser. If section 7 had provided for a default of "all the kindred hereinbefore named," instead of "all the persons hereinbefore described," possibly it would have been susceptible of the defendant's reading. But among the persons before "described" is "mother, competent to take an estate of inheritance therein," and we have no authority to leave out any part of the description. It is the want of a mother competent to take, that would pass the estate under the law of section 11, and we add nothing to the law by taking in all these words, but simply take the description which we are referred to. The words "competent to take" are as much part of the description of the person as the word "mother," and this mother does not answer to the whole description. She was not competent to take, because the estate did not descend from any person of her blood, and was not a new acquisition of her daughter, the intestate, and therefore she is not one of those before described in the act.

The case provided for by section 7 is a default of issue, and of full brothers and sisters and their descendants, and of father and



mother competent to take an estate of inheritance; then it shall go to the next of kin generally, if an original estate, and to the next of kin of the line of the first purchaser, if a descended or devised estate. This is a case of the latter kind, and was rightly decided. Judgment affirmed.

*Maffit v. Clark*, 6 W. & S. 258; *Lewis v. Gorman*, 5 Barr 164; *Parr v. Bankhart*, 10 Harris 291; *Emes v. Brown*, 1 Am. L. R. O. S. 634; *Danner v. Shissler*, 1 Casey 289; *Walker v. Dunshee*, 2 Wright 431; *Burr v. Simm*, 1 Whart. 252.

*In the Oyer and Terminer of Cambria County.*

COMMONWEALTH v. MOORE.

(Vol. XI., p. 369. 1864.)

1. Law of homicide in Pennsylvania defined.
2. Adultery, by the law of Pennsylvania, will not justify homicide.
3. Insanity in law defined, analyzed, discussed, and applied to the question of homicide.

INDICTMENT for murder.

*P. S. Noon*, District Attorney, *H. D. Foster*, *James Potts*, and *A. Kopelin*, for the Commonwealth.

*John Scott*, *B. G. Childs*, *C. L. Pershing*, *D. McLaughlin*, and *R. L. Johnston*, for the prisoner.

The facts are sufficiently detailed in the charge to the jury by

TAYLOR, P. J.—Joseph Moore, the prisoner at the bar, is charged in the indictment which you have been sworn to try, with the murder of Jordon Marbourg. The case requires of this court, and of you, gentlemen of the jury, the discharge of the most solemn and responsible duty ever cast upon a court and jury. The life of this unfortunate prisoner, on the one hand, and, on the other, the maintenance of the law made and ordained to shield and protect life, are committed to us; and the discharge of our respective duties to the one and to the other, is required of us alike, according to our best judgment, under the solemn

sanction of an oath. It is our duty to state to you the law, and to indicate the questions for your decision which arise in its application. It is your duty to apply the law, as you receive it from the court, to the facts in evidence, as you have received them from the witnesses, and heard them discussed by counsel, and so make up your verdict. We have written and pondered every word we have to say to you; and it is our earnest prayer that you may be guided to conclusions which will discharge the solemn obligations of the oath taken by you all when you entered that box, and result in "a true deliverance between the Commonwealth and the prisoner."

Murder, as defined by the common law, is committed, "when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and in the peace of the Commonwealth, with malice prepense or aforethought, either express or implied." "A person of sound memory and discretion" is one who has sufficient knowledge to know and understand the nature of the act, and that it is a violation of his moral and social duty, and will subject him to punishment. But every one is presumed by the law to be sane, and to possess this measure of understanding, and he is responsible for his acts, unless this presumption be overcome by facts and circumstances disclosed in the proof of the principal fact, or shown by affirmative evidence in the defence. Malice, in its legal, as distinguished from the popular sense of the word, does not mean spite or malevolence against the deceased in particular, but that the fact has been attended with such circumstances as the ordinary symptoms of a wicked, depraved and malignant spirit; a heart regardless of social duty, and fatally bent on mischief. It is either express or implied. Express malice is when the killing is with a sedate, deliberate mind, with formed design manifested by external circumstances, such as previous threats or menaces, former grudges, and concerted schemes to do the party bodily harm. Implied or legal malice means that the fact has been attended with such circumstances as carry with them the plain indication of a malevolent spirit. The law implies malice in every deliberate cruel act committed by one person against another, however sudden.

Every unlawful killing is therefore murder, unless it be shown to be a less offence, or no offence at all.

This is murder at common law, and this is murder in Pennsylvania. Our statutes furnish no new definition of the crime. What was murder at common law is still murder; but our statute, for the purpose of more just punishment, distinguishes between different acts of malicious homicide, and divides murder into murder of the first and murder of the second degree. It is in the language of Act of 22d of April, 1794, re-enacted in the Act of 31st March 1860, that "all murder which shall be perpetrated by means of poison, or lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree."

The duty is imposed on the jury, when they find the prisoner guilty, of discriminating between the two degrees of murder, in the verdict. It is not difficult, usually, to recognise the murders in the first degree, here specifically defined; but more difficulty has arisen in determining whether a particular murder is included in or described by "any other kind of wilful, deliberate, and premeditated killing." This phraseology evidently means a degree of deliberation similar to that indicated in the defined cases of "murder perpetrated by means of poison or lying in wait; and from the case of Mulatto Bob, 4 Dallas 145, tried by Chief Justice McKean, soon after the passage of the Act of 1794, down to the present day, the uniform judicial construction has been, that whenever there plainly appears to have been a formed design, or a specific intent, however suddenly formed, to take life, it is murder of the first degree. When such design, or intent to kill, is not shown beyond a reasonable doubt, or when there is a reasonable doubt whether the murderer, when the mortal wound was inflicted, intended anything more than to do great bodily harm, it is murder in the second degree. The test

inquiry is, did the prisoner, at the time, deliberately aim at life, and intend to kill?

A response to this inquiry must be given by the jury, from all the evidence. Such deliberation and design may be shown—and it is for the Commonwealth always to make it out beyond a reasonable doubt—by express evidence of such design, or by circumstances and conduct which necessarily imply it. It may be an irresistible inference from the weapon used, and the manner of its use. If, for example, he deliberately aim a loaded pistol at the head or breast of another, and discharge it; or if, with deliberate aim, he cleave the skull with an axe, it could not admit of a moment's doubt that he intended to kill. And if he had time to deliberate and form such design, though but for a minute, and did so, it is a "wilful, deliberate, and premeditated killing," and murder of the first degree. This has been the uniform construction of our statute; and, with the report of the commissioners to revise the penal code before them, that they had made "no attempt to interfere with the law of murder as it has existed since the Act of 1794," for the reason that it had "been so thoroughly considered, and its construction and its meaning so entirely settled by a long course of judicial decisions," the legislature, in 1860, adopted, without the change of a word, the old statute.

A homicide, indicted as murder, may be reduced to manslaughter, by evidence which rebuts the presumption of malice; or to no offence at all, by evidence showing it to be justifiable or excusable.

Manslaughter is the unlawful killing of another without malice. It is a killing which usually happens in a sudden heat and quarrel, and upon sufficient provocation. The law, from tenderness to human infirmity, considers a homicide committed in passion, upon what it judges sufficient provocation, as committed without malice, and therefore, only manslaughter. Provocation, without passion, or passion without provocation, is not sufficient for the purpose. And provocation, such as will avail for the purpose, has a defined legal signification. No breach of a man's word, no trespass to his lands or goods, no insult by words, no matter how provoking or insulting they may be, will free a party killing

and Marbourg in a very few minutes, and on Monday "he told me that if the report was true, he would shoot Marbourg in one or two minutes." Thompson Kimmell testifies that about the 6th of February the prisoner remarked to him that it was bad enough, and that if it was true, he could settle with Marbourg in a minute. He turned to Marbourg and said "if this report was true, he would kill him in two minutes—he would come Sickles over him." Captain Hite testifies that on Friday, 5th February, the prisoner, in a conversation with him, said "if he found they were guilty—he was rather under the impression it was a slander upon his wife—but if he found Marbourg guilty, by the eternal God he would kill them dead in their tracks." The witness understood him to say in this connection, that if he found it to be a slander, or that they were guilty, he would kill either.

This simple statement of the undisputed facts, in view of the law as we have given it to you, gentlemen of the jury, discloses, beyond any room for reasonable doubt, if the prisoner was at the time responsible, a wilful, deliberate, premeditated killing.

The defence, as stated in the opening argument for the prisoner, is two-fold :

"First, that the homicide was justifiable, under all the circumstances.

"Second, that the defendant was not a responsible agent."

1. Upon the first proposition here stated, it is surely unnecessary to dwell a minute. We are surprised, indeed, to hear it asserted or hinted even, here, whatever might be said elsewhere, that, if the prisoner was at the time a responsible agent, this is, or in any possible view of it could be, a justifiable homicide. Justifiable! There is no ground for a reasonable doubt that the prisoner acted at the time under the belief that the deceased had committed adultery with his wife; or that he had sufficient reason for that belief. Judging from his terrible earnestness when he uttered it, added to the evidence of the guilty intimacy which he had discovered, and of course involving her, it is no doubt true, as he said, that she had "confessed it." But if he had caught them in the very act, and instantly killed Marbourg, it will not be claimed surely, that our law would hold him guiltless. It would not have been justifiable homicide. That would have

such a provocation as would have reduced the killing to manslaughter. That is all. But he would still be guilty of manslaughter. We are told that the Jewish law punished adultery with death; but that is not the law of Pennsylvania. This court, and you, gentlemen, have not been sworn to administer the municipal law of the Jews. Our law has not made adultery a capital offence; how could it justify the infliction of that penalty? Or, if that were the penalty, how could it justify any injured party in taking the law into his own hands; becoming the prosecutor, court, jury, and executioner, and in sending, without a trial, or an hour's warning, the accused culprit into the presence of his God? To come to such a state of things would, we submit, be "progressing" backwards. "There would be exceedingly wild work taking place in the world," Judge Park well remarks, "if every man were to be allowed to judge in his own case." If he may claim to do it in one case, why not in another? As a remedy, too (as the facts in this unfortunate case afford the most touching illustration), it is absurd almost to madness. Without any resulting good, without restoring anything lost, it gives one hundred-fold more publicity to the family disgrace under which he smarts, beside bringing upon himself the indelible stain of blood. And while, as a remedy for his wrongs, he brings these aggravated evils upon himself, by his lawless act, he inflicts the deepest injury upon others who are as innocent as himself of the crime he would punish, and as much injured by it. Mrs. Marbourg, as, with true Christian philosophy, she reminded the prisoner, was as much injured (since a woman must be allowed as keen sensibilities as a man) by the criminal conduct of his wife and her husband, as he was by the guilty conduct of her husband and his wife, and each one of her nine children was as innocent as his son, and yet his act visited her with the desolation of widowhood, and made her children orphans. There are persons, we know, who ignorantly and thoughtlessly, or wickedly, proclaim that the adulterer should be shot down, and who busy themselves in propagating that morbid and mischievous sentiment; but it requires very little discernment to see how much wiser the law is, than the reckless impulses of human passions.

We repeat, gentlemen, the homicide was not justifiable under

all or any of the circumstances. Nor have we been able to arrive at the conclusion that the prisoner had legal provocation such as would extenuate it. We do not find the law to be so. Besides, to say nothing of the evidence of express malice, dating back a week, could it admit of a reasonable doubt that there was more than sufficient time for passion to cool? We turn, therefore, to the other ground of defence.

2. Was the prisoner, at the time of the homicide, a responsible agent? or, in other words, was he insane?

The just principle upon which this defence rests, is, that one whose perception of right is perverted or destroyed by mental malady, is not responsible for his actions, any more than an infant. The law imputes to them no guilt whatever; and, when such a state of mind at the time of the commission of an act sought to be punished as a crime, is shown to have existed, it is the duty of the jury to find the defendant not guilty. And by a recent statute of this Commonwealth, the Act of 81st March, 1860, known as "the revised Penal Code," it is enacted that "in every case in which it shall be given in evidence upon the trial of any person charged with any crime or misdemeanor, that such person was insane at the time of the commission of such offence, and shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether he was acquitted by them on the ground of such insanity." This, as it is indicated in the statute, so that he shall be treated and provided for as his unhappy situation and the safety of the community in which it is thus ascertained to be unsafe to let him go at large, may require; and such, should the defence set up in this case prevail, will be your duty.

The law, gentlemen, which must govern your inquiries, and to which you must apply, and by which you must judge of and pass upon the facts relied upon to establish the defence of insanity, as declared by all the judges in England, in Mr. Naghten's Case, and by the English courts ever since, and by almost every American court, including the Supreme Court of Pennsylvania, and by the most able and eminent judges, among them Chief Justice Shaw of Massachusetts, and the late distinguished Chief Justice

Gibson of Pennsylvania, and in the words which we have felt it to be our duty heretofore to state it to a jury in a capital case, is this?

“Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the satisfaction of the jury; and to establish a defence on the ground of insanity, it must be clearly proved, that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, did not know that he was doing what was wrong.” However others may speculate, it is the duty of a jury to bring the evidence to this test.

Upon this general subject, we state to you the law as applied to a case before the judges of our own Supreme Court (three of them present), in the language of Chief Justice Gibson:

“Insanity is mental or moral; the latter being sometimes called homicidal mania, and properly so. It is my purpose to deliver to you the law on this ground of defence, and not to press upon your consideration, at least to an unusual degree, the circumstances of the present case on which the law acts.

“A man may be mad upon all subjects; and then, though he may have glimmerings of reason, he is not a responsible agent. This is general insanity; but, if it is not so great in its extent or degree, as to blind him to the nature and extent of his moral duty, it is no defence to an accusation. It must be so great as entirely to destroy his perception of right and wrong; and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will, and making the commission of the act, in his apprehension, a duty of overruling necessity. The most apt illustration of the latter is, the perverted state of religious obligation which has caused men sometime to sacrifice their wives and children.

“Partial insanity is confined to a particular subject, the man being sane on every other. In that species of insanity, it is plain that he is a responsible agent, if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate



subject of punishment, although he may have been laboring under a moral obliquity of perception, as much as if he were laboring under an obliquity of vision. A man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints. On this point there has been a mistake as melancholy as it is popular. It has been announced by learned doctors, that if a man has the least taint of insanity entering into his mental structure, it discharges him of all responsibility to the laws. To this monstrous error may be traced both the fecundity in homicides, which has dishonored this country, and the immunity which has attended them. The law is, that whether insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action.

“But there is a moral or homicidal insanity, consisting of an irresistible inclination to kill, or to commit some other particular offence. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognised only in the clearest cases. It ought to be shown to have been habitual or at least to have shown itself in more than a single instance. It is seldom directed against a particular individual; but that it may be so is proved by the case of the young woman who was deluded by an irresistible impulse to kill her child, though aware of the heinous nature of the act. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary either to show by clear proof its contemporaneous existence evidenced by present circumstances, or the existence of a particular tendency developed in previous cases, becoming in itself a second nature.”

We introduce here, and answer, the written points submitted by the prisoner's counsel :

1. "The court are requested to instruct the jury that if they believe that at the time of the killing the defendant was in such a state of mind as to be unable to apply the test of right and wrong to the particular case, he is not a responsible agent, and the verdict should be, not guilty."

This is the test or criterion, in passing upon evidence of the existence of insanity, in its common and usual forms, to a degree that will relieve from responsibility ; and we answer the point in the affirmative.

2. "The court are requested to instruct the jury that if they believe the prisoner to have been governed by an uncontrollable impulse ; his will no longer in subjection to his reason, owing to the excited and continued impetuosity of his thoughts, and the tumultuous and confused condition of his mind ; that, goaded by a sense of grievous wrong, he was wrought to a phrensy bordering upon madness, which, for the time being, rendered him unable to control his actions or to direct his movements, their verdict should be not guilty."

We are at some loss to understand what is here meant. If the point is predicated of moral insanity, which is recognised in *Mosler's Case*, 4 Barr 264, and which we recognise, we affirm it. We recognise moral insanity, however, as they did, as of uncommon occurrence, and evidence of the existence and operation of which, since it cannot be tested by the general rule applicable to the common and usual forms of insanity, is to be received and passed upon in view of the cautions suggested in the case referred to. If the point means more or less than we have supposed, we refuse our assent.

You will inquire, then, gentlemen, whether the prisoner was laboring under moral insanity, and in doing so, you will remember the cautions suggested in the case read. The general test here fails, for in this mania, it seems, one may be drawn on to consequences which "he sees, but cannot avoid," and "be aware of the heinous nature of the act." There is little, in such case, to distinguish it from an ordinary criminal act. "To the eye of reason, every murderer is a madman." In the commission of

every crime, the judgment and conscience are overborne for the time by temptation to evil, acting upon the wickedness of the heart and exciting the evil passions to overmastering strength; but to allow that to excuse, would be to make crime its own justification and evidence of its own innocence, and to strike at the foundation of all accountability. It is well said, therefore, that "the doctrine which acknowledges this mania is dangerous in its relations, and can be recognised only in the clearest cases." The evidence adduced to establish it should be subjected to the strictest scrutiny. "It ought to be shown to have been habitual, or at least to have shown itself in more than one instance." "To establish it as a justification in any particular case, it is necessary either to show by clear proofs its contemporaneous existence, evidenced by present circumstances, or the existence of a particular tendency developed in previous cases." Is there such proof here? Were the shots fired at the deceased without discrimination or without a motive? Had a tendency to such acts been developed in a single instance in the whole life of the prisoner before this act of homicide, or has it been since?

If the prisoner was not laboring under moral insanity, you will inquire whether, upon the evidence here, he was laboring under mental malady of any kind, so as not to know and understand the nature of the act he was doing, and that it was wrong and would subject him to punishment. And we propose to detain you but a short time longer, with a few observations upon the evidence in this part of the case.

It is claimed on the part of the prisoner that his appearance and conduct, on that occasion, explained and accounted for by other evidence heard in his behalf, evidenced insanity. The witnesses state that he was wild and excited in his appearance, violent in his gestures, his voice raised to a high and unnatural pitch and heard in a crying tone, and his expressions, some of the witnesses say, were incoherent. The witnesses themselves were of course more or less excited, and they use their own words to describe his conduct and to express their own impressions. Some express his manner and appearance as "excited" and "wild;" some of them say he was in "a phrensy." They testify that he swore profanely, and used also low and vulgar expressions.

The question here is, was this the incoherent raving and phren-sied conduct of a maniac or one at the time insane, or was it the violence of one excited by passion and seeking revenge? Was it insanity, or was it anger? You will judge. Violent gestures, loud tones and excited looks are the natural expressions of anger, varying in degree with the temperament of the person and the intensity of his passion. Profanity seems also to be the natural language of angry passion. The witnesses say that his appearance was different from what they had ever noticed it; but none of them had ever seen him angry. Was his conduct natural or otherwise, supposing him to have been sane and to have sought out Marbourg and shot him down, in revenge for an injury? If, calm and unexcited, and as the witnesses had always before seen him, or with a smile on his face, instead of the fire of anger in his eye, he had met Marbourg and shot him down, without any assigned or known motive, and then turned around and walked calmly away, without manifesting any excitement or concern, what would have been the conclusion, that he was sane or insane?

It is claimed also that his appearance and conduct, on that occasion, were in such striking contrast with his habits and character through his whole life, as to exhibit a complete transformation, which is only reasonably explained on the supposition that the sad calamity that had befallen him, the evidence of which he had confirmed that morning by the confession of his wife, acting upon an excitable temperament for a week, during which he had ate and slept but little, had dethroned his reason. And it is true that he has shown, by all the witnesses, not merely a good, but a very good, an excellent character. It has been shown, too, that he has long been a regular, punctual and an exemplary member of a church; an elder, occasionally officiating for the preacher in his absence; that no one had ever heard him use a profane or vulgar word, or any expression which might not have been used in any company. All this is entitled to your consideration, and to such weight as you think it deserves, in determining the question of his sanity. Is it probable, the inquiry naturally arises, that if his reason had not for the time been overthrown, he would have acted and talked in a manner so in-

consistent with his whole previous life, and so contrary, apparently, to his very nature, as exhibited in the proof of his excellent character as a man and a Christian? And yet it is not to be forgotten that men of the most exalted personal and religious character have fallen into crime. David, who was a man after God's own heart, was guilty of adultery, and, to hide it, of murder. And we read that when the mob had taken his Divine Master before the high priest, "Peter sat without in the palace, and a damsel came unto him saying, thou also wast with Jesus; but he denied before them all, saying, I know not what thou sayest." He was accused by another, "and again he denied with an oath, saying, I know not the man." And "after a while they that stood by accosted him with the same accusation; then began he to curse and to swear, saying, I know not the man." He soon afterwards "went out and wept bitterly." Peter was guilty of lying and profanity. It was conduct grossly inconsistent with his religious character; but it is not intimated that he was insane. The Saviour, "who knew what was in the heart of man," said to his followers, "watch and pray that ye enter not into temptation." And an apostle said, "let him that thinketh he standeth take heed lest he fall." Such is human nature, that a good character is no certain guaranty that its possessor may not fall into sin, and but feeble evidence against clear proof of guilt. Still we commend this evidence to your consideration upon this question of insanity, and you will allow it all the weight you think it merits in the prisoner's behalf.

It has also been shown that one of the prisoner's brothers is insane, and has been a raving maniac for twenty-eight or thirty years; and that he has a sister, who, as some of the witnesses expressed it, is a weak-minded woman. She is married and has children, but, in the opinion of some of the witnesses, is not capable of giving proper attention to her children and her domestic affairs. This evidence was offered and received to show a hereditary taint. Insanity is, no doubt, a hereditary disease, which may appear and re-appear, overleaping sometimes a generation; and proof of its existence in a family is pertinent evidence on a question like this. The evidence here, however, going no further than we have stated, is very slight. It does not appear that his

parents or any of his ancestors have been insane, or any of the family, except one brother. But, if such proof were made, the force of it would only be to show a liability, or a predisposition at most, to the disease. That is not the disease. If a hereditary taint were established, it might aid in solving the question, whether his unusual conduct is most reasonably ascribable to insanity or anger. You will judge whether this evidence sheds any light on the question.

We all remember, too, that the prisoner became suddenly ill here in this room on last Friday, and it has been shown that, after he was taken to the jail, he was laboring under delirium, and was, for a short time, phrensied and raving. He imagined there were persons there trying to injure him, and he wanted the sheriff sent for to protect him, when the sheriff was there, trying to calm him. He wanted to see his son, when his son was present. He fancied they wanted to shoot him, and that he saw blood on his breast. He continued in that state near half an hour, when he fell asleep and awoke rational. This was delirium, "resulting," as Dr. Bunn testifies, "from depression following high nervous excitement, and resembling *mania a potu*." During its continuance, there can be no doubt he would not have been responsible for any act done by him. But the question is not what was his condition on Friday, but on the 12th of February, when he shot Marbourg. The evidence has no other bearing on this question than as it may tend to show the existence of some predisposition to delirium or mania, under like circumstances, and from a similar cause, and of the same character. He had been under excitement a week before the homicide. This fact, with the evidence now under consideration, it is argued, explains and accounts for his conduct at that time. It is not made to appear, however, that he labored under any delusion then. He was dealing with a real character, and for a reason then given. To the excitement up to that time was added that of the terrible tragedy, of everything that has followed to him, and of this trial, and yet we do not learn that he had any mania or delirium during the intervening month. That mania, too, results from and follows excitement; while he was under high excitement at the time of the homicide. It is to be remarked, also, that in *mania*

*a potu*, with which Dr. Bunn classes it, the patient is not fierce, but fearful; his delusion being apprehended danger to himself, which he is trying to escape; and so it was with him on Friday.

On the other hand, it is urged that the prisoner, during the whole of the week before the homicide, was ferreting out and trying to ascertain the truth of the reports concerning his wife and the deceased; going from one person to another, and from place to place, as he discovered some new source of information; comparing statements and noticing discrepancies, in his efforts to get at the truth, as counsel would prepare a cause; that, after having satisfied himself of the truth of the reports, he provided the loaded pistol and went to the vicinity of the post-office, where, as it is alleged, he expected to find the deceased; waited and watched, lying in wait for him in Wehn's store, as it is also alleged, till he passed; followed him to the post-office, and shot him down—what he declared a week before he would do, if he found the report to be true, and giving that reason for it at the time and afterwards. In all this, it is argued against the prisoner, he was following out and executing a deliberately formed and repeatedly declared purpose, reasoning at every step, and knowing and understanding what he was about. It is urged, also, that he afterwards went to the office of Irwin Rutledge, Esq., knowing where it was, and that he was a magistrate; stating to him that he had shot Marbourg, and had come to surrender himself into the hands of the law, expressing at the same time his belief that God would forgive him, and his willingness to be tried by a jury of his country. This, it is argued, all clearly shows that he knew at the time the nature and consequences of the deed, and knew and understood before what tribunal he was answerable for it.

You, gentlemen of the jury, will take into careful consideration the whole evidence, and determine the prisoner's responsibility. This is all we have to say to you.

If you find the prisoner guilty, you will state in your verdict the degree of his crime, or of what you find him guilty. If you find him not guilty on the ground of insanity, the only ground on which you can acquit him, it will be your duty to state that

you find he was insane at the time of the commission of the act, and that you acquit him on that ground.

And now, gentlemen, we have discharged our duty. We have dealt faithfully with this case. We sit here, as you sit in that box, to discharge our duty, as you must discharge yours, under the solemn obligations of an oath. Having done so, according to our best judgment, no conscious self-reproach, which we should of all consequences most dread, will ever rise up within us to disturb us in the future. For other consequences, we are not responsible. It is not our province, nor yours, to make the law, but to administer it. It is not for us or for you to remit its penalties; the pardoning power is lodged in other hands. Whatever the result may be, to the prisoner or to the public; whether it be a result which will convict the prisoner, or acquit him; that will vindicate the law, or strike it down; whatever the result may be, we are acquitted at the bar of our own conscience.

The case, and the responsibility of its decision, are now with you.

See *Young v. Rogers*, *Leading Criminal Cases* by Bennett & Heard, vol. I., 94, and the cases cited in the note; *Commonwealth v. Winnemore*, 1 Brewster 356.

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*In the Circuit Court of the United States for the Western  
District of Pennsylvania. In Equity.*

BRADLEY ET AL. v. REED ET AL.

(Vol. XII., p. 65. 1864.)

1. Notice previous to motion for an injunction, required by 5th section of the Act of Congress, 2d March, 1793, may be waived by appearance and filing answer.
2. As a general rule in the practice of courts of equity, nothing can be read on such motion but the answer, and if the answer denies the equity of the bill, the injunction will be dissolved.
3. Waste is an exception, upon the ground that an irreparable mischief would ensue, and the court will interpose to prevent it.
4. To show waste, affidavits are admissible, even after answer filed.
5. A court of equity will not permit a vendee in possession with the great



- bulk of the purchase-money due and unpaid, to cut and take away timber, and thus diminish the security of the vendor.
6. So also, an injunction lies against a mortgagor in possession to stay waste. The court will not suffer him to prejudice the security.
  7. Since the Statute of Westminster 2, giving one tenant in common a legal remedy against his co-tenant, courts of equity have interposed to prevent waste and preserve the corpus of the estate until partition.
  8. Pending a bill in equity, one tenant in common will not be permitted to strip the land of its timber. It is an injury recognised by law, and the remedy by injunction is applicable to every specie of waste.
  9. Courts of equity will dissolve an injunction, where it appears that the complainant has been guilty of intentional delay in prosecuting his cause.

THIS is a bill in equity, claiming title to eleven thousand acres of land in Elk and Jefferson counties, and praying an injunction to stay waste. The land is of great value on account of the timber. The injunction was granted on filing the bill. Respondents' counsel moved to dissolve it.

The motion was argued by *Mr. Marshall* and *Mr. Purviance* for, and *Mr. George P. Hamilton* against it.

Opinion of the court was delivered by

MCCANDLESS, Dist. J.—Although this injunction issued without the previous notice required by the 5th section of the Act of Congress of 2d March, 1793 (Brightly 256), it was admitted, at the argument, that the irregularity was cured by an appearance and filing the answer.

What we have now to consider, is not the question of title, which has been elaborately and ably argued, but whether, with the lights before us, we would grant a preliminary injunction.

This is an application by one tenant in common charging his co-tenant with waste.

As a general rule in the practice of courts of equity, nothing can be read on such a motion but the answer. If the writ has issued, and the answer, when filed, denies the equity of the bill, the injunction will be dissolved. But there are many cases where this rule does not prevail. Waste is one of them; and the exception to the rule is upon the ground, that an irreparable mischief would ensue, and the court will prevent that irreparable mischief by its interposition: *Smith v. Cummings*, 2 Parsons 96.

The affidavit of Mr. Lucas was received, not to prove title, but waste; and this, according to the uniform current of decisions, was admissible. As to who has the better title is to be determined when the proofs are in, and upon the ultimate hearing. At present, the affidavit is only material in this, that it shows by a letter from Reed to Bredin, dated the 24th May, 1864, "that I (the respondent), have employed hands to cut timber, upon the warrants not embraced in the lease to Rhines and Carman."

Assuming that the answer exhibits such an equitable title as would authorize a chancellor to decree a specific performance, the respondent is a vendee in possession, with the great bulk of the purchase-money due and unpaid. A court of equity will not permit him to diminish the security of his vendor until he is paid. The principal part of this is the mortgage for \$40,000, presently due, and the mortgagee could intervene, as Chancellor Kent says, in 2 Johns. Ch. 148, against a mortgagor in possession to stay waste.

The court will not suffer him to prejudice the security.

Independent of this, although at common law one tenant in common had no legal remedy against his co-tenant for waste, since the Statute of Westminster 2, 13 Edward I., ch. 33, giving such redress, courts of equity have interposed to protect the corpus of the estate until partition.

As was said in *Hawley v. Clowes*, 2 Johns. 122, "Lord Eldon admitted the propriety and necessity of this power in the court between tenants in common where the waste was destructive to the estate, and not within the usual and legitimate exercise of power."

Here is a bill filed, claiming, not partition, but title. By the respondent's answer, they are admitted tenants in common and "pending the suit, it appears extremely fit, that the tenant in common in possession should not be permitted to strip the land of its timber." The peculiar value of the land in controversy is the timber, and if between this date and the final hearing, the respondents were permitted to fell trees, convert them into lumber, and raft them to market, it would greatly diminish that value. It is, therefore, an injury recognised by law, and the remedy by injunction is applicable to every species of waste, it

being to prevent a known and certain injury. And this remedy is peculiarly proper pending a bill to try the title to this very land.

This injunction must therefore be continued until further order. But the complainants are admonished that the court will, on motion, dissolve it, if it appears in the future that they have been guilty of intentional delay in prosecuting their cause: 1 Eden 145; 4 Wash. C. C. 174.

The motion to dissolve the injunction is overruled.

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*In the District Court of Allegheny County.*

VOIGHT & Co. v. McKAIN.

(Vol. XII., p. 98. 1864.)

1. The duty imposed by the United States Stamp Laws on instruments of writing may be paid either by the maker or the party for whose use or benefit they are made.
2. And when an adhesive stamp is used for denoting said duty, it may be affixed and cancelled by the maker, or the party for whose use or benefit the instrument is made; but the stamp must be so affixed and cancelled at the time the paper is issued, otherwise the same will be deemed invalid and of no effect.
3. As between an endorsee for value and the maker of a promissory note, to which the proper stamp was affixed and cancelled by the payee when he issued or passed the note to the endorsee, the delivery of the note by the maker to the payee does not constitute an issuing of it within the meaning of the Stamp Laws, unless there be proof of its then actual issue.
4. Therefore the endorsee is entitled to recover against the maker, on a note so delivered, stamped and issued, in the absence of proof of its actual issue by the maker.

*A. H. Miller*, for plaintiff.

*John Mellon*, for defendant.

On a reserved question the following opinion of the court was delivered September 10, 1864, by

WILLIAMS, A. J.—The question reserved in this case, for the

consideration and judgment of the court in banc, may be thus stated :

Is the endorsee entitled to recover against the maker of a promissory note, to which the stamp required by the Act of Congress, instead of being affixed and cancelled by the maker, at the time of the making and delivery of the note to the payee, was affixed and cancelled by the latter when he endorsed and issued the same to the endorsee ?

The commissioner of internal revenue, in answer to some inquiry, has said, that when the maker of a check, draft, note or any other document, neglects to put on the required stamp, it will not do for the party receiving the same to affix the stamp and cancel it. It must be returned to the maker for him to do it : Edw. Stamp Act 276, n. 1. But the usage of the commercial and business community here is not in conformity with the opinion of the commissioner. The banks, as we have learned on inquiry since the argument in this case, are in the habit of discounting negotiable paper as freely where the required stamp has been affixed by the payee and endorsee, as by the maker or drawer. In this conflict between the opinion of the commissioner and the usage and practice of the banks and business community, the question assumes a more serious aspect, as its decisions may, in effect, declare valid or void, as against the makers, a very large amount of negotiable paper in circulation, and which has been taken on the credit and responsibility of the makers as well as of the endorsers.

What then are the provisions of the act imposing stamp duties ? Who is authorized or required to pay the duty imposed thereby ? And where an adhesive stamp is used for denoting the duty, who may affix and cancel the same, and how and when may this be done ?

The 94th section of the act provides, "That on and after the first day of October, eighteen hundred and sixty-two, there shall be levied, collected and paid, for and in respect of the several instruments, matters and things mentioned and described in the schedule (marked B.) hereunto annexed," which includes promissory notes, "or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them shall be written or printed, by any person or persons or

party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several duties or sums of money set down in figures against the same respectively, or otherwise specified or set forth in the said schedule." And the 99th section enacts, "That in any and all cases where an adhesive stamp shall be used for denoting any duty imposed by this act, except as hereinafter provided, the person using or affixing the same shall write thereupon the initials of his name and the date upon which the same shall be attached or used, so that the same may not again be used." These two sections are in harmony with each other. The former which imposes and declares the duty on the several instruments, matters and things mentioned and described in the schedule, provides that it shall be paid by the party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued; and the latter provides that when an adhesive stamp shall be used for denoting the duty imposed by the act, the person using or affixing the same shall write thereupon the initials of his name and the date upon which the same shall be attached or used. Construed together, they clearly authorize either the party who makes, signs and issues the instrument, or the party for whose use or benefit it is made, signed and issued, to pay the required duty, and to affix and cancel the stamp used for denoting the same. The maker of a promissory note, or the payee for whose use or benefit it is made and issued, may under the provisions of these sections, affix and cancel the stamp used for denoting the duty imposed thereon. Either is authorized to affix and cancel the stamp, and it is immaterial by which of them it is done. But when must it be affixed and cancelled, and what penalty is incurred if it is not done within the time limited and provided therefor?

What constitutes the offence by which the penalty is incurred, and when is the offence complete within the meaning of the act?

The 95th section provides, "That if any person or persons shall make, sign, or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the duty hereby imposed thereon, or without having thereupon

an adhesive stamp to denote said duty, such person or persons shall incur a penalty of fifty dollars, and such instrument, document or paper, as aforesaid, shall be deemed invalid and of no effect." What then is the import and meaning of this section? Is it to be taken and understood literally, or is it to be construed in harmony with the preceding and subsequent sections, so that the provisions of the whole may be operative? If it is to be read and understood literally, any person who makes or signs any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the duty imposed by the act, or without having thereupon an adhesive stamp to denote said duty, incurs the penalty which it prescribes. Was it the intention of Congress to prohibit the making or signing of any instrument or document mentioned and described in the schedule, under a penalty of fifty dollars, if the vellum, parchment or paper, upon which the same should be written, was not duly stamped, or an adhesive stamp, denoting the proper duty, affixed thereto? And were they guilty of the absurdity of providing, as a further penalty, that such instrument, document or paper should, for the want of such stamp, be deemed invalid and of no effect? The mere making or signing of an instrument, document or paper, intended for circulation or to operate by delivery, gives it no validity or effect. It is invalid and of no effect until issued. It could not, then, have been the intention of Congress to prohibit the making or signing, but it was their intention to prohibit the issue of any instrument, document or paper before the stamp duty imposed thereon should be paid. In order that the offence should be complete and the penalty attach, there must be an issuing of the instrument, document or paper mentioned and described in the schedule. And we must, therefore, read the word "or" before "issue" and "issued," in this and the preceding section, as if written "and." The offence declared and prohibited, then, consists in the making, signing and issuing any instrument, document or paper contrary to the provisions of the section; that is to say, without the same being duly stamped for denoting the duty imposed thereon, or without having thereupon an adhesive stamp to denote said duty. What, then, is the meaning of those prohibitory clauses, which

were intended to describe and define, and the violation of which constitutes the offence for which the penalty is provided? To ascertain their precise meaning, these clauses must be read in connection with the provisions of the sections already quoted, and their meaning will plainly appear. The preceding section, as we have seen, provides that the duty imposed by the act may be paid either by the maker of the instrument or by the party for whose use or benefit it is made and issued. And where an adhesive stamp is used for denoting the duty, the subsequent section provides that the person using or affixing the same—and this may be either the maker of the instrument or paper, or the party for whose use it is made—shall cancel the same in the manner therein provided. And the time for affixing the stamp is limited and fixed by the provisions of the section under consideration. It must be done when the instrument, document or paper is issued. If it is issued without the required stamp, it is to be deemed invalid and of no effect. When, then, was the promissory note in this case issued. Was it issued when it was signed by the maker and delivered to the payee? The reserved question does not so declare, and its actual issue to the payee is not shown by the evidence. The maker, in his plea, denied that he had signed, and impliedly that he had issued, the note. He alleged that the signature of his name, as maker, was a forgery. It is true that the evidence showed the genuineness of the maker's signature, and the jury found that he actually signed the note, and it may be conceded that a presumption arises, from the making and delivery of the note to the payee, that it originated in a real transaction and was given for a valuable consideration; in other words, that it was issued. But this is not a conclusive presumption of law, upon which the court is bound to act. It is a mere presumption of fact arising out of the ordinary and usual course of business. The jury might have been justified in acting on the presumption, and finding as a fact that the note was actually issued when it was delivered by the maker to the payee. But, in the absence of such a finding, would the court be justified in acting on the presumption in order to enforce the penalty prescribed by the act? Or should there be clear proof of the fact that the note was

actually issued by the maker, before declaring it invalid, and of no effect in the hands of an endorsee for value? Ought the penalty to be exacted on a mere presumption or doubtful inference? The note may have been an accommodation note, and it is not improbable that such was its character from the nature of the defence set up; and if so, the mere handling or delivery of it to the payee was not an issuing of it by the maker within the meaning of the act. It had no validity or effect as against the maker so long as it remained in the hands of the payee. Its delivery to the payee was not an issuing of the note, but for the purpose of its being issued. There can be no doubt upon the question of its issue by the payee, for the evidence shows that he endorsed and delivered it to the plaintiffs in a real transaction, and for a valuable consideration. But before doing so, he affixed the required stamp, and cancelled it in the mode prescribed by the act; and as the evidence fails to show that it had been previously issued, we are not compelled or required to declare it invalid and of no effect as against the maker.

We have the greater satisfaction in coming to this conclusion, because it does no injustice to the government, or to the parties in this case. The object of Congress in providing the penalty was to secure the payment of the duty. There is no reason for declaring the note void so far as respects the government, for the duty has been paid by one of the parties expressly authorized to make the payment. The maker, when he signed and delivered the note to the payee, thereby promised to pay the amount thereof to his order. It was endorsed to the plaintiffs for a valuable consideration, and it is, therefore, but equitable and just that the maker should pay them the amount thereof in accordance with his promise.

We cannot forbear remarking that the penalty provided by the act seems to us unnecessarily harsh, and that in its practical operations it may work great injustice. In every case where the stamp is omitted, it is the result of negligence or design. If of the former, the act enables the maker to set up his neglect of duty to avoid the instrument or paper which he has issued, and thus to perpetrate with impunity the grossest wrong, upon the party for whose use or benefit it was issued, under the shield



and sanction of law. If of the latter, then the maker, by insisting on the penalty, shows that he not only intended a fraud on the government, when he issued the instrument or paper, but also on the party for whose use or benefit it was issued; and the act allows him to set up his fraudulent omission of duty to avoid the instrument or paper so issued, and thus to rid himself of the obligation of every grant, contract or promise contained therein.

It is to be hoped that the provision will be so modified as to secure all the purposes intended, and prevent its becoming a snare to the unwary, and the means by which the dishonest can legally evade the performance of their obligations and the payment of their just debts.

Let judgment be entered in favor of the plaintiffs against the defendant on the verdict, for the amount found by the jury, with interest from the date of the finding, on payment of the verdict fee.

D'Armond v. Dubose, 2 American 718; Green v. Holway, 3 Id. 339; In re Letters Testamentary, 1 Legal Gazette Reports 67; M'Govern v. Hoesback, 3 P. F. Smith 176; Tripp v. Bishop, 6 Id. 424; Boyd v. Hood, 7 Id. 98; Jones's Appeal, 12 Id. 324; Rees v. Jackson, 14 Id. 486; Edward's Appeal, 16 Id. 89.

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*In the District Court of Allegheny County. In Equity.*

**EDMUNDSON ET AL. v. THE SCHOOL DIRECTORS OF ELIZABETH TOWNSHIP.**

(Vol. XII., p. 132. 1864.)

The Act of Assembly of April 28, 1864, permitting the issue of bonds by certain officers of the counties, townships, wards, &c., throughout the state, for the purpose of securing bounties to volunteers and prescribing the mode of such issue, is not unconstitutional.

**MOTION** for a preliminary injunction to restrain defendants from issuing bonds, for payment of bounties to volunteers enlisting in the United States military service and from levying a tax for payment of said bonds.

*George P. Hamilton*, for the motion.

*Loomis & Woods*, *contrâ*.

Concurring opinion filed September 30, 1864, by

WILLIAMS, A. J.—The main question discussed by the counsel, on the argument of the motion for preliminary injunction in this case, was the constitutionality of the Acts of Assembly under which the defendants are proceeding to issue and negotiate bonds for the payment of bounties, to those who voluntarily enlist as soldiers in the service of the United States, for the purpose of filling the quota of Elizabeth township under the late call of the President; and in virtue of which they propose to levy and collect a tax for the payment of the bonds so issued. Other minor, and subordinate questions were glanced at, but it was not seriously urged that the defendants were so far exceeding the power and authority conferred on them by the said acts, if the same are constitutional, as to make it the duty of the court to award the preliminary injunction prayed for, and enjoin them from further proceeding in the premises.

The inherent power of the legislature to pass the acts in question, in the absence of any constitutional prohibition, is not denied. It cannot be doubted that the giving of military bounties is a legitimate exercise of the sovereign power of a state or nation. Other governments have repeatedly exercised the power of giving bounties, in order to encourage the voluntary enlistment of soldiers into their armies, and of levying and collecting taxes in one form or another, for the payment of such bounties. If bounties may be paid out of the revenues of the government derived from taxation for general purposes, they may be paid by the imposition of a special tax for the purpose.

There is then no want of inherent power in the legislature over the subject of bounties, nor anything in the nature of the subject itself, that renders the exercise of the power by the legislature unlawful or nugatory. If not prohibited by the organic law of the state or federal union, the legislature had power to legislate on the subject, and the acts, adopted by them have not only the form, but the force, authority and sanction of law, and are binding on the citizen.

But it is contended that the legislature is prohibited from authorizing the payment of bounties, and the levying of a special tax for the purpose, by the 7th sect. of the 11th Article of the Constitution of Pennsylvania, being the first amendment of 1857. It is conceded that if the exercise of legislative power over the subject is not prohibited by this section, it is not forbidden by any other provision of the Constitution.

The 7th section of the amendment is as follows: "The legislature shall not authorize any county, city, borough, township or incorporated district, by virtue of a vote of its citizens or otherwise, to become a stockholder in any company, association or corporation; or to obtain money for, or loan its credit to, any corporation, association, institution or party."

The history of this amendment is recent and familiar. Counties, cities, boroughs, and perhaps in some instances townships, have made large subscriptions to the stock of corporations and companies chartered for the purpose of building railroads and constructing works of internal improvements.

These projects in many cases proved failures. The works were either suspended before completion, or, if finished, the revenues derived therefrom were insufficient to pay the interest on the cost of construction. The counties and municipal corporations that had subscribed to the stock of these companies, and issued their bonds or certificates of indebtedness in payment thereof, were, in consequence of the total or partial failure of these projected improvements, involved in a heavy burden of debt and threatened with ruinous taxation to meet the accruing interest. The debts and liabilities thus incurred were repudiated, and the payment of both the principal and interest resisted, on the ground that the legislature had no power under the Constitution to authorize the subscriptions that had been thus improvidently made. Litigation followed, and when the constitutionality of the laws authorizing the said subscriptions, and the validity of the bonds issued in payment thereof, had been judicially determined, the people resolved to strike at the root of the evil and prevent its recurrence in future; and for this purpose they adopted the amendment under consideration. It has no reference to the subject of military bounties, and it was not intended

to have. Its whole scope, purpose and design was to prohibit the passage of any law authorizing counties or other municipal bodies to become stockholders in railroad or other corporations; or to obtain money for, or loan their credit to, them. The acts in question do not authorize the township represented by the defendants "to become a stockholder in any company, association or corporation;" nor do they authorize the township "to obtain money for, or loan its credit to, any corporation, association, institution or party." The phrases "to obtain money for, or loan its credit to," as used in this section of the Constitution, have a definite and well-known signification. They presuppose and imply the relation of principal and surety. The party for whom the money is obtained, or to whom the credit is loaned, stands in the relation of principal, as it respects the party obtaining the money, or loaning the credit; while the latter stands in the relation of surety, as it respects the former. The township, in issuing bonds or certificates of indebtedness, for the purpose of raising money to pay bounties to volunteers, in order to fill its quota, does not "obtain money for, or loan its credit to," any party, in the sense in which these phrases are used in the amendment. There is no party, for whom money is obtained, or to whom credit is loaned, standing in the relation of principal to the township, and to whom the latter stands in the relation of surety. The main provisions of the acts in question are: 1st. The authority conferred on the counties, cities and sub-divisions thereof to give military bounties; 2d. To levy and collect taxes for the payment thereof. The authority given to borrow money and issue bonds or certificates of indebtedness for the payment of the bounties, is but an incidental provision, in anticipation of the levying and collection of the money by taxation. If, therefore, taxation for the payment of military bounties is proper, and its authorization is a legitimate exercise of the power of the legislature, it is not a valid objection to the constitutionality of the acts in question that they provide for a loan and the issue of certificates of indebtedness therefor, in anticipation of the receipt of the taxes thereby authorized to be levied and collected. It was not the design of the constitutional amendment to prohibit the legislature from authorizing the imposition of taxes for the sup-

port, maintenance and defence of the government and the preservation of its very existence. The taxation authorized by these acts was intended to promote and secure these very objects, and was therefore a legitimate exercise of the taxing power of the state unless it conflicts with some provision of the Constitution of the United States, or is in direct and manifest collision with the enactments of Congress on the same subject.

There can be no such conflict or collision, unless first, the Constitution of the United States has expressly in terms given an exclusive power over the subject to Congress; or second, has prohibited its exercise by the states; or third, unless there is a direct repugnance or incompatibility in the exercise of it by the states; or fourth, unless the acts in question are in direct and manifest collision with the laws of the union on the same subject. Now it is not pretended that the Constitution of the Union has expressly given to Congress an exclusive power over the subject of military bounties, or that it has prohibited the exercise of a like power by the states. So far from it, the power to give bounties is nowhere expressly given, or mentioned in that instrument. The power exercised by Congress of giving bounties is an incidental one, arising out of the power, "to raise and support armies;" "to provide for calling forth" and "for organizing, arming and disciplining the militia:" and unless there is a direct repugnance, or incompatibility in the exercise of it by the states it may be concurrently exercised by them. There are powers, which, it requires but little reflection to perceive, cannot be concurrently exercised by the federal and state governments—as the power to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies. When Congress has exercised either of these powers, it excludes all exercise thereof by the states. Any exercise of these powers by the states must necessarily conflict with its exercise by Congress. There could be no uniform rule, or uniform laws established by Congress on any one subject, if the separate states were allowed to establish another rule, or adopt different laws. They must of necessity, in such case, conflict with or be repugnant to each other. And if the states should establish the same rule or adopt the same laws, their exercise of such power would be nu-

gatory, for the rule or laws would derive all their force, sanction and authority as being the expression of the legislative will of the nation. But how is it with the power to give bounties? May not this power be concurrently exercised by the states? Is there any necessary repugnancy or incompatibility in its exercise by the states and by Congress? I cannot perceive that there is. On the contrary, it seems to me, that its exercise by the states may be ancillary to its exercise by Congress, and may aid in the accomplishment of the purpose intended. There is then no direct repugnance or incompatibility in the exercise of the power by Congress and the legislatures of the respective states; and unless the acts in question are in direct and manifest collision with the laws of Congress on the same subject, they are not unconstitutional, and do not transcend the legislative power of the state. Are these acts, then, in collision, or are they in harmony with the enactments of Congress on the same subject? The laws with which these acts are supposed to conflict, provide for calling forth, organizing and disciplining the national forces. They provide for the enrolment of every able-bodied male citizen in the loyal states, and of every man of foreign birth therein who has declared his intention to become a citizen of the United States, between certain ages; and they authorize the President to call for such number of volunteers as, in his opinion, the exigency of the public service demands; and provide for the apportionment of the respective quotas of the several states in accordance with their representative population; and authorize the dividing of the states into military districts, and the latter into sub-districts corresponding with the wards, boroughs and townships composing the same, and the apportionment of the respective quotas of each; and, in case the requisition of the President is not filled by voluntary enlistments within a specified time, they empower him to order a compulsory draft for the purpose of filling the deficiency, and they authorize the government to give certain specified bounties to volunteers enlisting for one, two and three years. How do the Acts of the legislature in question conflict with any of these provisions? They do not provide in any way for the enrolment, calling forth, organizing, arming and disciplining of the national forces or the militia of the state, nor prescribe any

rules or regulations respecting the same. On all these subjects they are wholly silent, and as it respects them, there can be no possible conflict. But these provisions constitute the burden and subject-matter of the laws of Congress. The provisions therein respecting bounties is incidental, whereas the subject-matter and only purpose of the acts of the legislature are to authorize the giving of bounties and the imposition of taxes for the payment of the same, or of the certificates of indebtedness issued therefor.

So far from there being any collision or conflict between the laws of federal and state governments in this respect, they are in perfect harmony with each other. They were intended for the same purpose and they mutually aid in promoting the same object. The bounties authorized to be given by both governments were intended to stimulate and promote voluntary enlistments, and they co-operate harmoniously and powerfully to this end. Both governments have a reciprocal interest in the matter. It is better that the ranks of the national forces should be filled with volunteers rather than with conscripts. It is better that the quota of the state should be furnished by voluntary enlistment rather than by a compulsory draft. There is greater efficiency in the one case, and less hardship in the other. The bounty given by Congress aids the state in furnishing her quota by voluntary enlistment; and the bounty authorized by the legislature serves to fill the ranks of the national forces with volunteers. In their practical working there is co-operation and mutual aid but no conflict or collision.

The legislature, therefore had power to pass the acts in question, and as the defendants have not exceeded the authority therein given, the motion for a preliminary injunction is properly refused.

See *Speer v. School Directors*, 14 Wright 150; *Ahl v. Gleim*, 2 P. F. Smith 432; *Wester v. Hade*, Id. 474; *Washington County v. Berwick*, 6 Id. 466; *Keacy v. Bricker*, 10 Id. 9.

*In the Supreme Court of Pennsylvania.*

PENNSYLVANIA ANNUITY COMPANY v. VANSYCKEL.

(Vol. XII., p. 154. 1864.)

The acceptance by an heir of a portion of a decedent's estate, charged with the payment of the interest of one-third of its valuation to the widow for life, creates a personal liability on the part of the heir for its payment.

ERROR to the District Court of Philadelphia.

The opinion of the court was delivered by

STRONG, J.—In *Pidcock v. Bye*, 3 Rawle 188, it was held that an action of assumpsit may be maintained against an assignee of land, subject to the charge of a widow's thirds, to recover the principal of such charge, by those entitled to it after her death, without an express promise of the assignee to pay it. In that case it is true the judgment was entered *de terris*. The case has no doubt generally been understood as determining that there is no personal liability of the terre tenant, that nothing more than a judgment to be levied of the land can be recovered. Such may be the law, but *Pidcock v. Bye*, is no authority for the doctrine. The Circuit Court gave judgment *de terris*, from which the assignee of the land subject to the thirds appealed in vain. If he was liable to a personal judgment, he could not of course complain of a judgment *de terris*, which was less. 'No more was decided in *Shelly v. Shelly*, 8 W. & S. 153. Neither of these cases rules that there is no personal liability to pay even the principal of the valuation remaining charged on the land during the life of the widow, resting on the assignees of the land subject to the charge. There may be and there are reasons why the assignee should be liable only so far as the value of the lands extends. In most cases however the encumbrance is reckoned as part of the purchase-money which the assignee has agreed to pay, and the conveyance of the land is the consideration of his agreement. We need not, however, inquire in this case into the extent of the liability of a terre tenant who has purchased from an heir. The case now before us is that of an heir himself who has voluntary taken



land subject to the payment of the interest of one-third of its valuation to the widow of the decedent for life. The charge is one imposed by the Act of Assembly. The Act of 29th March, 1832, in its forty-first section, enacts that "should the widow of the decedent be living at the time of the partition, she shall not be entitled to the payment of the sum at which her purpart or share of the estate shall be valued, but the same together with the interest thereof shall be and remain charged upon the premises, if the whole be taken by one child, or other descendant of the deceased, or upon the respective shares, if divided. \* \* And the legal interest shall be annually and regularly paid by the persons to whom such real estate shall be adjudged, their heirs and assigns, holding the same according to their respective portions, to the said widow during her natural life in lieu and full satisfaction of her dower at common law, and the same may be recovered by the widow by distress or otherwise, as rents in this Commonwealth are recoverable."

The heir then takes the land descending to him and adjudged to him in severalty on the conditions prescribed in the act which are, that he shall pay annually to the widow the interest upon one-third of the valuation, and that it may be recovered from him as rents are recoverable. That this creates a personal liability to pay, even without a bond or recognisance securing the widow's interest, is manifest. In substance, the heir is a purchaser from the widow and her interest is the price. Her dower is exchanged for her interest under the intestate laws, and the heir obtains the land unencumbered by her dower, in consideration of his assuming to pay her the annual interest. It is abundantly settled that the acceptance of a devise of land charged with the payment of a legacy creates a personal liability for its payment on the part of the devisee. This was shown to be the law by Judge Kennedy in *Lobach's Case*, 6 Watts 167, when he reviewed the authorities in an elaborate opinion, and the doctrine has been asserted in numerous other more recent cases, and if so, why is not the acceptance of a portion of a decedent's estate expressly charged with a duty to the widow, an assumption to perform that duty? There is no difference in principle between the cases. The payment of the legacy charged and the payment of the inte-

rest charged, are alike the price affixed to the land, and the devisee or the heir may not take the land and disappoint the testator or the law. Moreover, it is plain, that personal liability on the part of the heir to whom land is adjudged in Orphans' Court partition, was intended by the 41st section of the Act of 1832, for another reason. The act declares that the interest shall be annually and regularly paid to the widow by the persons to whom the real estate shall be adjudged, and that it may be recovered as rents are recoverable. The heir is put into the position of a lessee, so far as obligation to pay rent reserved is concerned. If a personal judgment against him is not a lawful mode of enforcing payment of the interest accrued to the widow, it is not recoverable as rents always have been.

This is enough for the case. It makes no difference that the heir is a minor, and that the property was accepted for him by his guardian: *Gelbach's Appeal*, 8 S. & R. 205.

The judgment of the District Court is affirmed.

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*In the Supreme Court of Pennsylvania.*

BROWNE v. RIPKA & Co.

(Vol. XII., p. 170. 1864.)

1. One largely indebted, by forming a copartnership, and transferring to such copartnership a part or even the whole of his property, provided it was *bonâ fide*, does not thereby hinder, delay or defraud his creditors, under the statute of Elizabeth. Their remedy may be changed, but it is still a full, ample and complete remedy.
2. An assumption by some of the partners individually of all the debts of a firm largely indebted, is in law a valuable consideration for the release to them of the interest of another partner.

ERROR to the District Court of Philadelphia.

*F. C. Brightly* and *Andrew Miller*, for plaintiff in error.

*J. Clay* and *W. F. Judson*, *contra*.

The opinion of the court was delivered at Pittsburgh, October 20, 1864, by

READ, J.—We are to deal with the alleged errors of the court below in matters of law, for errors in the finding of the jury, in matters of fact, were proper subjects for that tribunal, on a motion for a new trial, but are irrelevant in this court. This narrows the discussion, which occupies very voluminous paper books, practically to two questions: whether the court were in error in their statement of the law, 1st, as to the partnership of the 1st July, 1857; 2d, as to the release of the 20th November of that year.

Three facts were decided by the jury: 1st. That Joseph Ripka was not insolvent on the 1st of July, 1857, when the articles of copartnership were entered into; 2d. That there was no actual fraud in that transaction; nor in, 3d. The release of the 20th November, 1857. The only questions remaining are: whether those transactions, either or both of them, were fraudulent in law, and therefore invalid against creditors, and particularly as against the plaintiff below. Upon both these points it appears the law was correctly laid down by the learned president judge, in delivering the opinion of the court below.

The court were clearly right in saying that a man largely indebted may enter into a partnership, transferring a part, as was the case here, or even the whole of his property, provided it was *bonâ fide*, which the jury in this case found it was, and he does not thereby hinder, delay or defraud his creditors, under the statute of Elizabeth; for though their remedy may be changed, it is still a full, ample and complete remedy. "The entire interest of the debtor may be levied on and sold, the partnership thereby dissolved, a receiver appointed and the property taken possession of, and the firm wound up, for the benefit of the execution creditors, or, what is the same thing, the sheriff's vendee."

It was found by the jury that the consideration of the release was not grossly inadequate, such as to make it merely illusory; and it is clear that the assumption by the other partners, individually, of all the debts of Joseph Ripka & Co., was in law a valuable consideration for the release.

A *primâ facie* case, unrebutted, is conclusive; but the moment

contradictory or conflicting evidence is given, then it is for the jury to decide what the fact is, upon the whole evidence before them.

This disposes of the whole case, for there was no error committed in declining to answer propositions, which their decision upon the main question made entirely immaterial.

Judgment affirmed.

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*In the Supreme Court of Pennsylvania.*

**BILLMEYER ET AL. v. SLIFER.**

(Vol. XII., p. 172. 1864.)

1. A conveyance of land was made to one of three partners who gave a judgment against himself for the purchase-money, the said land, though not so expressly intended, having been purchased for the partnership, and conveyances were afterwards made in succession, by sheriff's sale of the interest of last two partners to one party, and by the Orphans' Court sale of the whole of the land after death of first partner to another party, notice of the sale to the first having been given to the last purchaser. Held, that the last purchaser took the property subject to the trust which existed in favor of the purchaser at sheriff's sale.
2. A partner who purchases property but takes the deed in his own name and gives a judgment against himself in payment, holds the portions of the other partners in trust for them to be executed when they shall pay their share of the purchase-money.
3. A sale for the payment of debts by the Orphans' Court discharges all liens.
4. Notice given to the buyer of property, at an Orphans' Court sale for the payment of debts, visits him with knowledge of all the facts implied in the notice.

**ERROR to the Common Pleas of Union County.**

The opinion of the court was delivered at Pittsburgh, October 20th, 1864, by

AGNEW, J.—The action in the court below was an ejectment by Colonel Slifer to recover the undivided two-thirds of three lots in Lewisburg. It was commenced amicably under an agreement

that no advantage should be gained by the position of the parties as plaintiff and defendants, Colonel Slifer being made plaintiff as a matter of form, for the purpose of testing his title.

The legal title to the premises was in Lewis Palmer, to whom T. S. Black conveyed, taking as a security for the purchase-money a judgment in the sum of \$1800. Upon the finding of the jury and instruction of the court, we must take the fact as indisputable, that Lewis Palmer bought the property for himself, J. J. Palmer and J. B. Ross, as partners, who with him and in partnership built thereupon and carried on a valuable planing mill. Lewis Palmer, therefore, held these lots in trust as to the undivided two-thirds for his partners J. J. Palmer and J. B. Ross, subject to the payment of the purchase-money secured to Black at the time of the conveyance by a lien co-extensive with the whole title.

In May 1860, Lewis Palmer died, and in February, 1861, J. J. Palmer and J. B. Ross gave judgment to Colonel Slifer, under which he levied and sold their title in the lots. Colonel Slifer became the purchaser on the 18th of April, 1861, at \$75. Subsequently the administrator of Lewis Palmer presented his petition to the Orphans' Court, praying for a sale of these lots for the payment of debts, describing them as "three certain lots of groundwhereon is erected a planing mill situate in said borough, on the west side of Second street, north of Market, adjoining lot of George Holstein on the south, an alley on the west, lot of Mrs. Voise on the north, and Second street on the east, containing each sixty-six feet in width more or less with the appurtenances." The decree of sale was to sell "the within described real estate with the appurtenances. The petition and decree of sale were, therefore, co-extensive with the legal title as vested by the deed in Lewis Palmer. The defendants became the purchasers under this decree of the real estate thus described for the sum of \$3200, and the sale was confirmed in September, 1861, and a deed ordered to be made to them by the administrator.

At the time of the administrator's sale, Colonel Slifer gave public notice that he claimed the undivided two-thirds of the three lots under his purchase of the title of J. J. Palmer and J. B. Ross. There was also evidence tending to show their

possession of the premises, and the possession of Colonel Slifer after his purchase.

Thus the whole legal title being in Lewis Palmer, and the Orphans' Court sale being made under a decree to sell the whole property, the question directly arises, what interest did Colonel Slifer take by his purchase at sheriff's sale, and what title passed to the defendants under the administrator's sale?

The verdict establishes that Lewis Palmer held the title to the undivided two-thirds in trust for J. J. Palmer and J. B. Ross; but this was subject to the payment of their proportion of the purchase-money. Black's judgment was cotemporary with the conveyance, and was an encumbrance upon the whole title both legal and equitable, but it stood individually against Lewis Palmer, and was a personal charge against him alone. The trust was, therefore, subject to this encumbrance, and equity would not compel the execution of the trust by a conveyance, until the others had paid or secured to him their proportion of the charge. This charge not being against J. J. Palmer and J. B. Ross, though a burthen upon their estate, was not such a lien against them personally as would be discharged by a sheriff's sale of their equity. They held but an equity and no more, a right to call for a conveyance on extinguishing their proportion of the common burthen on the legal title, but not an estate subject to a specific lien against themselves. Neither lien creditors nor the sheriff in searching the record for liens could find any judgment against them. Their estate, therefore, when put up at sheriff's sale, stood in the same attitude as that of a vendee under articles of sale, the bidder buying the mere equity of the vendee. This brings us to the title of the defendants, and the question is, what title passed to them under the administrator's sale.

It is well settled that sales under decrees of the Orphans' Court are judicial, and all the principles of public judicial sales are applied to them as fully as to sales under the judgments of common law courts. The powers of this court have been well discussed, and its jurisdiction over the real estate of decedents for the payment of debts ably vindicated by the present Chief Justice in the case of *Horner and Roberts v. Hasbrouck*, 5 Wright 169. The following cases fully establish the judicial

character of sales made under its decrees: *Bashore v. Whisler*, 3 Watts 490; *Fox v. Mensch*, 3 W. & S. 444; *King v. Gunnison*, 4 Barr 171; *Moor v. Shultz*, 1 Harris 98; *Vandever v. Baker*, Id. 121. In making such sale the administrator is bound to follow the order of the court, which is the guide and rule by which the title of the purchaser is to be judged: *Miles v. Diven*, 6 Watts 148; *Myers v. Hodges*, 2 Id. 381; *Vandever v. Baker*, 1 Harris 121; *Bashore v. Whisler*, 3 Watts 490; *Randolph's Appeal*, 5 Barr 242.

One of the principal effects of a sale for the payment of debts under an order of the Orphans' Court is that it discharges all liens. Both the Act of 1794 and the Act of 1834 provided that the lands sold under the order of the Orphans' Court should not be liable in the hands of the purchaser for the debts of the decedent. This has been settled also by numerous decisions holding that such a sale discharges the liens of judgments, mortgages, recognisances and legacies: *Moliere's Lessee v. Noe*, 4 Dall. 450; *Clark v. Israel*, 6 Binn. 393; *Gilmore v. Commonwealth*, 17 S. & R. 276; *Custer v. Detterer*, 3 W. & S. 28; *Randolph's Appeal*, 5 Barr 242; *Moor v. Shultz*, 1 Harris 98.

Then how does this case stand upon these principles. The title of the whole estate vested by Black's deed, in Lewis Palmer. No trust was expressed upon its face. The decree of sale was for the whole property; the sale was so made and reported, and the confirmation was as broad as the decree and report of sale. The order of the court was absolute and without limitation. The administrator prayed the court to sell the whole, the decree so ordered and the confirmation so established it. Upon such a sale as this nothing can be more firmly settled than that without notice of the trust the purchasers took the estate discharged of it.

This brings us directly to the effect of the notice given by Colonel Slifer of his title by purchase of the interest of J. J. Palmer and J. B. Ross. Its effect would be to visit the defendants as purchasers with a knowledge of all the facts implied in the notice. This would be that the whole legal title was in Lewis Palmer, who had made himself liable for the payment of the purchase-money; and that he held two-thirds thereof in trust for Colonel Slifer, who succeeded to the estate of J. J. Palmer and J. B. Ross,

subject to the payment of two-thirds of the purchase-money. This knowledge would visit upon the purchasers at the Orphans' Court sale just this duty, viz. : to convey the title to two-thirds of the premises to Colonel Slifer upon his paying two-thirds of the charge upon the title. The reason is that Colonel Slifer's notice did not vary or affect the order of sale, which was to sell the whole premises, but operated simply upon the title which the purchasers took under the sale. Here it is the maxim *caveat emptor* has its application. Under the order the whole must be exposed and sold for the best price they will bring, and the purchaser takes all the estate which can pass; except so far as Colonel Slifer's notice operates to protect himself. The effect of the notice was to save to him the trust, which otherwise the sale would have extinguished, but this must be upon his doing equity, by complying with the obligation lying at the bottom of the trust, viz. : to pay his proportion of the purchase-money charged upon it. The purchasers at the Orphans' Court sale must therefore bid and pay for the value of the interest sold, to wit, for the one-third owned by Lewis Palmer its out and out value; and for the two-thirds held in trust the sum charged upon the trust and for which Lewis Palmer held the legal title as his security. To this extent he held the estate in the two-thirds both legally and equitably. This sum, with interest, the defendants will be entitled to receive from Colonel Slifer, on conveying to him the two-thirds in execution of the trust imposed upon them by his notice. The operation of these principles upon the sale will be further manifested by noticing the effect of the Orphans' Court sale upon the lien of Black's judgment.

Black's judgment was a lien, and the first in priority of payment, upon the whole premises in the name of Lewis Palmer. It mattered not what part or proportion should be judicially sold as the property of Lewis Palmer, Black was entitled to the whole proceeds of sale until his judgment should be discharged. It was in the power of the Orphans' Court, under the 32d section of the Act of 29th March, 1832, to direct what part or how much of the real estate should be sold. Therefore, whether it was one lot, one-third of three lots, or the whole, under the sale, Black, as the first lien creditor, was entitled to the proceeds of sale to the



extent of his claim. The lien, therefore, became extinguished, as to all that was sold under the order. Here the court having decreed the whole to be sold, the lien was entirely gone; and the debt to Black, if not satisfied by the proceeds, fell upon the other estate of Lewis Palmer, for it was a personal charge against him.

Black could look only to the administration of Lewis Palmer, after the sale discharged his lien; and having no judgment against J. J. Palmer and Ross, he could not follow their equity. Hence the necessity, that for Black's protection the sale of his debtor's estate should pass a title co-extensive with his lien, otherwise, his lien being extinguished by the administrator's sale, his remedy against the property bound by it was gone. The proof was, that the purchase was made of Black by Lewis Palmer alone. Black knew nothing of the trust, and cannot be involved in any question between Lewis and his partners. Hence, also, the necessity for Lewis Palmer's protection, that the purchasers should bid to the extent of the charge upon the two-thirds, as well as for Lewis Palmer's one-third; otherwise, his estate would be sacrificed, while his partner's estate would be discharged. Being solely bound for the judgment of Black, Lewis Palmer's legal estate was his protection against payment of the two-thirds owing by his partners; and if that should be sold from him, without a corresponding price being paid for it, his security would be extinguished, and his remedy against the land, by means of his legal title, would be lost. This title was not confined to the one-third, but stood, both in law and equity, against the two-thirds, to the extent of the paramount charge in favor of Black, for which he was also personally liable. The purchasers at the Orphans' Court sale were, therefore, bound to bid to the value of this interest, and were entitled to hold the title thus acquired until re-imbursed by Colonel Slifer.

The court therefore erred in not instructing the jury that Colonel Slifer could not recover, without payment of the two-thirds of the amount of Black's judgment, with interest. This could have been effected by a conditional verdict. No question as to making a tender before suit brought, can arise; the agreement for the amicable action providing that no advantage would be gained by the position of parties. Colonel Slifer may, there-

fore, be regarded as a defendant in possession, who is not bound to make his tender before ejectment brought.

The judgment is reversed and a *venire facias de novo* awarded.

STRONG, J., dissents, and files dissenting opinion.

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*In the Supreme Court of Pennsylvania.*

COMMONWEALTH v. HEISER ET AL.

(Vol. XII., p. 226. 1865.)

The 1st section of the Act of Assembly of 16th May, 1861, taxing the business of brokers and private bankers, imposes the three per cent. tax, not upon their gross receipts, but only upon the net profits of their business.

ERROR to the Common Pleas of Dauphin county.

The opinion of the court was delivered by

WOODWARD, C. J.—The question here is upon the meaning of the 1st section of the Act of Assembly of 16th May, 1861, taxing the business of brokers and private bankers. The doubt is whether the legislature meant that the three per cent. tax should be imposed upon the gross receipts or only upon the net profits of the earnings. The words of the statute, as far as they are material to the question, are that every broker and banker shall annually “make a written return, under oath or affirmation, to the Auditor-General of the Commonwealth, in which return he shall set forth the full amount of his receipts from commissions, discounts, abatements, allowances and all other profits arising from his business, during the year ending with the 30th of November, preceding the date of such annual return; . . . and shall pay into the state treasury three per centum on the aggregate amount contained in such return.”

The word “receipts” is the governing word, and describes the subject of taxation. It is the aggregate amount of these that is to bear the assessment. But the meaning of the word receipts—that is to say, the sense the legislature annexed to it in this

place—is the very question in debate. Taken in one sense, the “receipts” of a broker would include, in their “aggregate amount,” all moneys that came into his hands in the course of a year’s business, although he may have paid out and lost during the year more than he had received, as, indeed, the appellees claim they have done.

In another sense, the aggregate amount of receipts would be the surplus over expenditures and losses—in a word, net profits. In which sense did the legislature use the term?

They characterized the sources of the taxable receipts by enumerating “commissions, discounts, abatements, allowances and all other profits.” Whilst commissions and discounts are, in their nature, not only receipts, but profits, we would scarcely know that “abatements and allowances” were so. We would be as likely to think of subtractions from receipts and profits, as we would to consider them additions, if the laws of grammar, applied to this collection of words, did not compel us to regard them as sources of profit. The words “all other profits” interpret those going before, and prove that in the legislative thought “abatements and allowances” were sources of income as well as “commissions and discounts.” Profits are personal gains from labor or capital. The receipts, then, that the legislature meant to tax were what the broker or banker should gain or receive for himself, from any or all of these sources of income. The products of these several sources, added together, would constitute the “aggregate amount” on which the assessment was to be made.

Taking the words of the enactment as our guide to the intention of the law-giver, it is our opinion that the thing provided for was an income tax, a tax on the profits of a particular class of business men. It seems to me that the argument for the Commonwealth overlooks the personality of this tax law, a feature that is plainly stamped upon its face. It is entitled, an act relating to brokers and bankers, a particular, well defined, segregated, legally licensed class of individuals. A broker is a proxy, a factor, and an agent, one that is employed to buy and sell, and often by parties who have opposite interests to manage. The primary idea of a banker is that of a trustee, one who receives on deposit other people’s money, and gains his reward by

leaving it on interest. Both are representative men. Both deal in moneys and properties of which they are not owners, and stand as representatives for the owner. Now, it was against these men, in their representative characters, that this tax law was levelled, not against the property of their employers. The statute recognises the necessity of a license to these men, and super-adds the tax to the license fee, but the license fee is not more a personal imposition than the tax.

The legislature did not mean to tax the broker for the amount of a note sold for a customer in the market, though he received the proceeds; because that money, notwithstanding it passed through his hands and thus entered into his gross receipts, belonged to another, and would be taxable in his hands; but the commissions belonged personally to the broker, and for them he was to be taxed. So discounts received for letting out the capital of others, are the private personal gains of bankers and brokers, and taxable under this law, but not the capital merely handled and not owned by them. The profits of their own capital would clearly come under this law. Keeping this in view, the personality of the enactment, it is not difficult to ascertain the proper objects of taxation. What comes to the broker or banker from his business, as his personal rewards, is taxable as receipts; what comes to him in trust, for others, is not taxable as part of his receipts. If this should lead to the inconvenience pointed out by the attorney-general, of trading on borrowed capital, whilst the individual capital of brokers and bankers was lent on interest, a modification of the statute, not a misinterpretation of it, would be the proper remedy.

A law taxing the aggregate annual receipts of lawyers, as a class or profession, would scarcely be applied to moneys collected for clients, or to properties passing through their hands, though in some sense, these would be receipts, but everybody would agree that professional earnings or gains were the receipts intended to be taxed. So here, "all other profits" mark the professional incomes intended, and these words admit of no doubt as to their meaning. They are general and comprehensive words, and according to Dwarria, in the very place quoted by the learned Attorney-General, "where particular words are followed by gen-

eral ones, the latter are held as applying to the persons and things of the same kind with those that precede." As "commissions and discounts" are personal gains, and in the legislative vocabulary "abatements and allowances" are no less so, these all must be "profits," and the "receipts" meant are therefore the profits of the business referred to in the statute. As the statutory evidence proved, that for the year in question, these defendants received no profits, there should have been no tax.

These conclusions, not the result of that strict construction to which revenue laws, like penal statutes, are fairly subject, rest well on the phraseology of the enactment, and are supported by the ruling in *Drexel's Case*.

The judgment is affirmed.

AGNEW, J., dissents.

STRONG, J., concurs.

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*In the Register's Court of Dauphin County.*

IN THE MATTER OF THE NUNCUPATIVE WILL OF DANIEL SMITH,  
DECEASED.

(Vol. XII., p. 270. 1865.)

1. A soldier at home on furlough cannot make a valid nuncupative will within the provision made in favor of soldiers in actual military service.
2. That exception applies only to soldiers engaged in the active duties of the field, on an expedition, in the temporary camp, on the march, in the battle or siege, and not to those at home or in permanent quarters.

THE opinion of the court was delivered by

PEARSON, P. J.—Daniel Smith, a volunteer militia soldier in the service of the United States, being at his home in Middletown, in this county, on furlough, in the month of March last, made a nuncupative will, bequeathing all his personal property and effects to certain relatives named, and called on the persons whose testimony has been produced to bear witness that in case of his death such should be his will. Smith was, shortly after his return to his regiment, killed in battle. At the time of making

this oral disposition of his property, Smith was in good health, which is the first and principal objection to its validity. The Act of April 8, 1838, provides "that in all cases such nuncupative will shall be made during the last sickness of the testator," which is an indispensable requisite. It must be made in such extremity of last sickness as precludes the possibility of making a written one: see 5 Whart. 397; 4 W. & S. 357; 6 Id. 184; 4 Rawle 46; 10 Barr 254; and many other authorities might be cited to the same effect. There can, therefore, be no pretence that this is a valid nuncupative will within the statute already cited. But a question of much greater difficulty and importance arises under another exception in the law, which provides "that, notwithstanding this act, any mariner being at sea, or any soldier being in actual military service, may dispose of his movables, wages and personal estate, as he might have done before the making of this act." This portion of our statute is copied from the 29 Charles II., ch. 3, to prevent frauds and perjuries, and should assume a like construction. There can be but little doubt that prior to the enactment of that law, such will of chattels would have been perfectly valid. What is the true construction of the act? What is meant by "a soldier being in actual military service?" In common parlance a soldier is understood to be in actual military service from the time of his enlistment until his discharge, whether he be in camp, garrison, hospital, at home, on furlough, on the march, engaged in battle or siege. Yet these various military positions have, in most countries of Europe, been very differently viewed in regard to the power of making wills. To aid us in construing the word, and arriving at their true interpretation, it may be beneficial to look into the history of the enactment. It is very clear that this exception to the general provisions, in relation to wills, was copied from the civil law by the framers of the Statute of Frauds and Perjuries. It was the law of ancient Rome, first promulgated by Julius Cæsar, and embraced every Roman soldier generally, wherever situated. This was subsequently modified so as to exclude those who were at their own homes, they being required to execute their testaments in the ordinary form. Afterwards, the power was still further limited, and confined to soldiers engaged

in an expedition, in military quarters, or in the camp. The Code of Justinian ultimately limited the exception to soldiers on an expedition, or engaged in a battle or siege; and the various commentators on this part of the Code appear to have settled down to the position that the soldier must be in an expedition, or engaged in active service, in quarters, or in the camp. The laws of nearly all of modern Continental Europe, either by express codes or judicial construction, seem to have adopted the same rule. Such appears to be the law of Russia, Westphalia, Bavaria, Spain, and, I think, Holland. Pothier says, the soldiers in forts and garrisons, or other places of safety, cannot avail themselves of this privilege, but the oral will must be made on the field of battle, on the march or expedition. Such is also the rule laid down by Swinburne, and which governed the English ecclesiastical courts at an early period. This subject has been most carefully examined, in some modern cases in the courts of Great Britain, especially in that of *Drummond v. Parish*, 3 Curtis's Ecclesiastical Reports 522, where the will of Major-General Drummond came in question. It was drawn up at his quarters in Woolwich, in his own handwriting, but not attested, as required by law; and though a most favorable case for the will, yet it was not supported, and the learned judge, after an elaborate examination of authorities, comes to the conclusion that the will must be made "when on an expedition," and is invalid if the soldier is in quarters. The judge, in his opinion, cites the case of *Sherman v. Pike*, where a soldier made his will on shipboard, or in the hospital, it is difficult to determine which, but the case appears to have been decided on the allegation he was on an expedition. It evidently would not have met the approbation of Sir H. J. Fast, had it appeared that he died in the hospital.

In *Bowles v. Jackson*, 1 Ecc. & Ad. 264, the officer was stationed with his regiment at Bombay, received orders on the 14th to march on the 22d to attack a fort; on the 20th executed an informal will; was taken ill on the way, and died three weeks after. The paper was refused probate as a will, because executed before he started from his quarters on the expedition. Again, in the case of *White v. Repton*, 3 Curtis 818, Captain J. H. Perry made an informal written will at his quarters in New Brunswick,

where his regiment was station, and held not to be within the exception in favor of soldiers in actual military service.

In the *Goods of Hill*, 1 Rob. Ecc. R. 12, 276, it was held that an officer, when on a tour of inspection of the enemy, could not make a valid will within the exception in favor of soldiers in actual military service. The soundness of this case I should take the liberty to question, unless it is misreported; but we find it referred to with approbation in *Hobart v. Hobart*, Jurist of 1856, p. 24. In the last-named case, an officer in India, when on his way to join his regiment, having left another, according to the military order, to which he had been temporarily attached, was taken sick at the house of a friend on the way, made an informal will and died. The will was held valid, and that he was in actual military service, being on his way to join his regiment at the time. This is the last decision in England to which my attention has been directed. It reviews all the cases cited and gives them its full concurrence.

There is another branch of this section relating to "mariners at sea," which has from time to time undergone judicial consideration in England, and to which a like strictness of construction has been uniformly applied. One of the earliest cases is that of Sir Hugh Seymour, admiral in command of the fleet in Jamaica, but who lived with his family on shore, at the official residence, yet was daily on board of the fleet. Held, that the will executed in his own house was not that of a mariner at sea, and therefore void. No exception was taken on account of high official station that he was not a mariner, for it is decided that a purser on shipboard is to be treated as a mariner within the statute. In the matter of Admiral Austin's will, the instrument was held good when made on board of his ship in a river of the East Indies, as he was at the time engaged in an actual expedition against the enemy. See 2 Roberts' Ecclesiastical Reports 611. The only case which I have noticed of a mariner's will, made on shore, being held good, is *In the Goods of E. J. Levy*, 2 Curtis 875, where a seaman on a ship of war went on shore at Buenos Ayres, under leave, and there met with an accidental injury from which he died; and held, that his will, written after the injury, was valid, as he must be treated only temporarily absent



from his ship; and it was declared to be unlike the case of Admiral Seymour, who was on shore at his own residence. The whole doctrine of mariners' wills has been changed by statute in England, as it is believed that great frauds existed under the law, by setting up fictitious wills for sailors. In this country the act remains in full force, and is applicable in both countries to seamen in the merchant as well as in the government service. We have but one decision in the United States that I have discovered, but in that the court showed a disposition to adhere to the same strictness of construction which has always prevailed in England. The case, *Warren v. Harding*, arose in the Supreme Court of Rhode Island, and is reported in 1 Amer. L. Reg. 408. It was that of a sea captain who took passage from Philadelphia in a vessel bound for Chagres, where he was to take command of a lighter in Chagres river, sickened before reaching the mouth of the Delaware river, made an informal will and died. Held, that he was not a "mariner at sea" within the statute, as he was only a passenger in the vessel in which he had embarked; although a seaman by profession, he was not at sea in that capacity.

We find the whole subject of sailors' and soldiers' wills, under this exception in the Statute of Frauds, carefully examined in the last American edition (1856) of Williams on Executors, vol. I., p. 101, when he sums up "actual military service" as confined to those who are on an expedition. As we conceive, it may more properly be defined to be those who are engaged in the active duties of the field, whether it be on the march, in the temporary camp, the battle, siege, or bivouac, but never can apply to the soldier who is in regular quarters or at his customary home on leave of absence. In that case the reason of the exception ceases, and consequently the law does not apply. When on active duty he cannot have the aid of counsel and direction; when at home he can, whether he be soldier or civilian. That which was intended as a privilege for the soldier arising from necessity, would, if carried to extremes, be found to be anything but a benefit. The most solemnly executed wills might be utterly revoked and destroyed, and new ones set up in their stead by mere word of mouth, depending on the frail testimony of slipper memory. A loose word spoken to a comrade, vaguely un-

derstood, or badly remembered, might direct personal effects to a large amount from their legal disposition, and this perhaps set up at a distant period of time. For it must be borne in mind that the Statute of Charles II., and our own Act of Assembly are not guarded as was the Code of Justinian, or the most of those of modern Europe. They confined this legal disposition of their soldier's intention to the period of three months, from the time of making it, and if it be continued longer it must be repeated or renewed. Ours is unlimited in time and indefinite in amount, provided it is confined to personal estate. Such declarations, unless subsequently revoked, might be set up as a will on the death of the soldier, although he long since had been discharged from the service, and returned to his home, for if once valid it would so remain until altered or annulled. This dangerous power makes it necessary to give the statute a very strict construction, and confine it within the limits to which it was intended to apply. Our immense army of volunteer soldiers in the field at this time, and the large amount of property owned by many of them makes it a question of great moment to the community. We have, therefore, given it a more careful examination than perhaps was called for by this particular case. To conclude in the language of an English judge, "I am not prepared to say that the privilege is one which it would be advantageous to the army, as a body, to possess. I think it would not be unlikely to lead to fraud and misapprehension."

The probate of the will presented to the court is insufficient, and must be refused.

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*In the Supreme Court of Pennsylvania.*

CALDWELL v. CALDWELL.

(Vol. XII., p. 274. 1865.)

1. Where a deed is made from a father to a son, in trust for the son's children on payment of a valuable consideration by the son, equity will regard the consideration paid as a settlement by the father upon the children, and will support the trust; and for this purpose, will if necessary, construe the

deed as a covenant on the part of the son to stand seised to the use of the children.

2. Such being the legal effect of the conveyance, parol evidence offered to show that a life estate was intended to be vested in the trustees for his own benefit, should be rejected as contradictory and subversive of the deed.

**ERROR to the Common Pleas of Armstrong county.**

The opinion of the court was delivered by

WOODWARD, C. J.—The conveyance of 11th January, 1845, was so manifestly a settlement by a grand father upon his grand children that we would defeat the plain intent of the instrument if the trustee should be construed to take a life estate. It was a deed from a father to a son in trust for the son's children, and if what was offered had been shown, the payment of a valuable consideration by the son, still equity would regard the consideration paid as a settlement by the father upon the children, and would support the trust, and for this purpose would, if necessary, construe the deed as a covenant on the part of the son to stand seised to the use of the children: *Sprague v. Woods*, 4 W. & S. 192. In *Dennison v. Goehring*, 7 Barr 180, Judge Kennedy, after recalling several authorities for a husband or father conveying real estate for the benefit of a wife or children, upon no other consideration than that of relationship, asks, "if a father then may convey property already acquired to his children, or any of them, without consideration, why may he not purchase in trust for their use and benefit? The principle is the same and must go to sustain the one as well as the other. The relationship between father and child is a sufficient consideration in law, if any were wanting, to support a purchase of real estate by a father in the name of the child, so that the use shall enure to the benefit of the latter, and no trust result to the father, as would be the case were he to purchase the estate in the name of a stranger."

If such were the legal effect of the conveyance, the parol evidence offered to show that a life estate was intended to be vested in the trustee for his own benefit, was properly rejected, for it would have been contradictory and subversive of the deed. Parol evidence is admissible to establish a resulting trust in real estate, as for example, to show that a conveyance to one was purchased

with the money of another, but as between father and son, a resulting trust is not to be implied from such evidence, and therefore it was properly excluded. Even if the conveyance had been made directly to the children, it would have availed the father nothing to show that he paid the purchase-money; but taking it to himself, upon an express trust for them, he excluded all possibility of implying a trust in favor of himself. It was a concurrent settlement by him and his father upon his children, and it must be left as it was fixed.

But it is said the defendant must turn out though beneficially interested in the land, because he is under a lease from the trustee. This would be so if it were not for the concluding clause of the lease which provides, that neither party is to have any advantage of this lease so far as the ownership of the land is concerned, but as to that they are to stand as if there were no lease. This action involves the question of "ownership" and nothing else, and the principle by which plaintiff seeks to silence the defendants' assertion of ownership is that by which a landlord prevents his tenant from questioning his title. In just such a case as this therefore the stipulation was that the lease should be treated as no lease. It was an awkward way of taking from the lease the very quality which the plaintiff wants to find in it, but having voluntarily given it up, it is unreasonable that he should imagine himself to possess it still.

These observations sufficiently answer the several errors assigned.

The judgment is affirmed.



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Where an administrator's account is referred to an auditor, who hears the parties and makes a report which is confirmed by the court, the parties are not entitled to a bill of review under the Act of 13th of October, 1840. *Cunningham's Appeal*, 177.

## ACTION.

Where an injury is occasioned through the negligence of contractors, their workmen or servants, the contractors are responsible; and no action will lie against the individual or corporation for whom the work is being done. *Painter v. Pittsburgh*, 339.

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## ADMINISTRATOR.—See EXECUTOR AND ADMINISTRATOR.

## ADMIRALTY.

1. A mortgage upon a vessel recorded under the Act of July, 1850, in the distribution of the fund arising from the sale of the mortgaged vessel, must be postponed to the liens for supplies and repairs, under the Acts of Pennsylvania for the attachment of vessels, even though the indebtedness for the supplies or repairs may have accrued subsequent to the recording of the mortgage. *Shrodes v. The Collier*, 304.
2. A mechanic having a lien upon a vessel, who receives a note for the same, cannot institute proceedings against such vessel until the maturity of the note, but may intervene, notwithstanding the note may not be due, and be paid out of a fund where the proceedings have been instituted by other parties. *Ibid.*
3. Under the Pennsylvania Attachment Act of 1858, the acceptance of notes or other securities for an existing demand, which would entitle the party to a lien upon a vessel, is to be regarded as a collateral matter, which can in no way work a satisfaction or extinguishment of the lien within the two years given by the act, until the indebtedness represented by such notes, &c., be fully paid. *Ibid.*

ADMIRALTY—*continued*.

4. Hence the fact that the note-taker includes an indebtedness against another vessel, not embraced in the libel, will not prevent a recovery upon the original demand, so long as the note remains in the hands of the lien creditor. Neither would the fact that the mechanic had endorsed a new note, which the owner of the vessel had negotiated, and with the proceeds lifted the original note given to the former for his demand, and that thus the original note had passed into the hands of the owner and maker. *Skrodes v. The Collier*, 304.
5. A mechanic may proceed upon his original lien, even though he may have taken a note and receipted his original bill, if it be not shown that there was a contract to take the less security and release the better. *Ibid.*
6. The assignee of a boat note may, without losing his lien under the act, renew his note held by him, and pass the original to the maker. *Ibid.*
7. It is sufficient evidence that the articles were necessary under this act, to show that the articles, &c., for which a lien is claimed, were ordered and furnished, and that from their nature they seem to be necessary. *Ibid.*
8. To maintain a lien for insurance, the insurer must hold a note or other acknowledgment of indebtedness, given for the premium of such insurance, totally disconnected from all other transactions between the parties, whether insurance of other boats or articles or otherwise. *Ibid.*
9. The lien for supplies will not follow portions of a vessel which may have been used in the construction of a new vessel. *Ibid.*
10. No attorney's fee can be paid to intervenors under this act, but one attorney fee being allowable in a case; and the fees of sheriff in such cases cannot exceed one dollar for each person served. *Ibid.*
11. A sheriff's sale of a steamboat does not discharge the lien of sailors' wages. *McGinnis v. The Grand Turk*, 326.
12. Otherwise, if the wages are due to the owner of the boat. *Ibid.*
13. A father may maintain an action in admiralty for the wages of his minor children, but it is a right which may be renounced or forfeited. *Ibid.*
14. He may renounce it by voluntarily allowing his child to have the exclusive use of the fruits of his own industry, or he may forfeit his right by neglecting to perform those duties which are the foundation of that right. *Ibid.*
15. A watchman, not during the navigation of the vessel, nor when she had cargo on board, but exclusively in a home port, at the marine railway, and when she was laid up for repairs, has no lien for his wages. *Ibid.*
16. This is not maritime service. It is the work of a landsman rather than a sailor. It is completed before the voyage is begun or after it is ended. It is, therefore, not a maritime contract which can be enforced in a court of admiralty. *Ibid.*



ADMIRALTY—*continued.*

17. Partnership accounts cannot be settled in a court of admiralty. *United States v. The Isaac Hammett*, 358.
18. Nor in a case of forfeiture, can a claim for alleged balances due by a part owner or co-partner, be entertained. *Ibid.*
19. The sentence of confiscation, if rendered, rises superior to all liens and equities. *Ibid.*
20. The rebellious states of the Union are public enemies, and no claim of a citizen or subject of an enemy's country, can be received. *Ibid.*
21. Every resident of a hostile place or country, is regarded, in such court, as a citizen or subject. *Ibid.*
22. His property, when libelled at the suit of the government, is condemned, without his being heard, as that of an enemy. *Ibid.*
23. After seizure by the surveyor or collector of a port of the United States, a libel is filed to declare the forfeiture. *United States v. The Allegheny*, 437.
24. A claimant who is an inhabitant of an insurrectionary state, takes his status from such state. *Ibid.*
25. Whether his capital be great or small, it contributes to swell the means of resistance, and is liable to confiscation. *Ibid.*
26. Even his loyalty will not protect him, because being an integral part of a state in rebellion, he is treated as a public enemy. *Ibid.*
27. New Orleans (the residence of claimant) having elected members of Congress, the government of the state of Louisiana being yet under the control of the insurgents, the position of the claimant is not changed. *Ibid.*
28. The persons "exercising the functions of government" there, not having disclaimed the acts of the insurgents, or suppressed the insurrection, the laws of the United States have not yet been fully vindicated. *Ibid.*
29. A vessel owned in whole or in part by a resident of New Orleans, found in any other port of the United States, is subject to condemnation. *Ibid.*
30. The first section of the Act of Congress of 30th of August, 1852, which provides that steam vessels carrying passengers, if navigated without complying with the terms of this act, shall be subject to a certain penalty, viz: a fine of \$500, has reference only to those provisions of the act which prescribe what is necessary in order to obtain a license to carry passengers. *United States v. The Science*, 446.
31. Offences committed against the other provisions of the act, and which occur after the vessel is fitted out and licensed, are not punishable under the first section, but have each a special penalty provided for them. *Ibid.*
32. Therefore, a vessel duly licensed after compliance with the preliminary requisites, if subsequently navigated without having on board "a competent number of pilots," is not subject therefor, to the penalty of the first section aforesaid. *Ibid.*

**ADULTERY.**

Adultery, by the law of Pennsylvania, will not justify homicide. *Commonwealth v. Moore*, 502.

**ADVERTISEMENT.**—See NOTICE; SHERIFF'S SALE.

**AFFIDAVIT OF CLAIM.**

Judgment will not be entered "for want of sufficient affidavit of defence," where the affidavit of claim is not in substantial compliance with the rule of court. *Garrard v. Allegheny County*, 338.

**AFFIDAVIT OF DEFENCE.**

1. In his affidavit of defence, the defendant must state "fully and particularly" the nature and amount of his set-off. *Adams v. White*, 21.
2. Judgment will not be entered "for want of a sufficient affidavit of defence," where the affidavit of claim is not in substantial compliance with the rule of court. *Garrard v. Allegheny County*, 338.
3. By the 8th section of the Act of 21st April, 1858 (Pamph. L. 387), municipal corporations are relieved from the necessity in any case of filing an affidavit of defence. *Ibid.*

**AGENCY.**

1. An agent's liability to his principal for negligence, by which a third person has been injured, is only contingent, while it is direct and certain to the party injured. *Dodge v. Bache*, 487.
2. An action against the principal by the party injured is *res inter alios acta* as to the agent, and the record is not admissible in evidence against him, except as to the amount of damages. *Ibid.*
3. Therefore, the rule that excludes an agent from testifying for his principal in such an action, is not founded in clear reason, and should not be extended; and his testimony should not be rejected, except upon the *quantum* of damages, unless his liability over has been clearly proved. *Ibid.*

**AMENDMENT.**—See SURPRISE.

**APPEAL.**—See ERROR AND APPEAL.

1. A justice of the peace is not liable in an action for damages for refusing an appeal when the party demanding was entitled to it. *Bogart v. Ink*, 332.
2. The principle of the law seems to be, that whenever the law requires the officer to decide upon the evidence, whether an act is to be done or not, if he considers the subject and mistakingly decides wrong, no action can be sustained. *Ibid.*

**APPRAISEMENT.**

The court will set aside an appraisal made under the Act of 9th April, 1849, when it is manifest there is a great inadequacy of price. *Fisher v. Hughes*, 272.

ARREST.—See PRIVILEGE.

ARSON.—See CRIMINAL LAW, 1, 2, 3, 4.

ASSESSMENT.—See TAXES.

ASSIGNMENT.

An assignment to a trustee for the benefit of a part of the assignee's creditors must be recorded. *Murphy's Assignment*, 271.

ATTACHMENT IN EXECUTION.—See EXECUTION ATTACHMENT.

ATTORNEY-AT-LAW.

1. The principles of comity and reciprocity recognised in admitting attorneys on certificates from other states are applicable only to citizens of other states, and not to our own citizens. *Brown, In re rule on*, 152.
2. Even a citizen of another state cannot claim admission here as a matter of right, on faith of his certificate; he can ask it only as a matter of grace. *Ibid.*
3. Our courts have the right, and it is their duty under the Act of 1834, to require that the applicant from another state be "learned in the law," as if he were a citizen of our own state. *Ibid.*
4. When an attorney has been admitted under a misapprehension of facts, which if known to the court would have prevented his admission, the court will rectify the mistake, when duly moved thereto, by striking his name from the roll. *Ibid.*

AUDIT.—See BILL OF REVIEW.

BAIL.—See RECOGNISANCE.

In Pennsylvania a prisoner charged with a capital offence, has a constitutional right, even after indictment found, to be admitted to bail, where the evidence produced on the hearing satisfies the judge to whom the application is made that the offence is not capital. *Commonwealth v. Lemley*, 362.

BANKERS AND BROKERS.

The 1st section of the Act of 16th May, 1861, taxing the business of brokers and private bankers, imposes the three per cent. tax, not upon their gross receipts, but only upon the net profits of their business. *Commonwealth v. Heiser*, 545.

BANKRUPTCY.

1. Contemplation of insolvency is not a "contemplation of bankruptcy" within the meaning of the Act of Congress of 1841. *Loneragan v. Fenlon*, 115.
2. A judgment creditor must have notice of a prior act of bankruptcy, or

**BANKRUPTCY—continued.**

- of the intention of the bankrupt to take the benefit of the act, before his judgment can be assailed. *Lonergan v. Fenlon*, 115.
- 3. The validity of the judgment cannot be called in question in a collateral proceeding. *Ibid.*
- 4. After a lapse of sixteen years from the date of the judicial sale under the judgment, a chancellor will not decree that it shall be set aside at the instance of the vendee of the assignee in bankruptcy. *Ibid.*

**BANKS.**

- 1. The 27th section of the General Banking Law of Pennsylvania of 16th April, 1850, is technically a penal statute, and is to be strictly construed. *Commonwealth v. Bank of Commerce*, 248.
- 2. To authorize the court or a judge to decree an assignment by the directors of a bank, under the 27th section of the Act of 16th April, 1850, it must appear that the financial officer of the bank not only refused to pay its notes or certificates in gold or silver, on demand, but that he also wilfully refused to endorse on them the day and year when they were presented for payment, or refused to give a certificate for money deposited in the bank. *Ibid.*
- 3. Where the proper officers of a bank absent themselves, and demand is made, during business hours, for payment of its bills in specie, and refused by the person in charge, not an officer, his offer to endorse the demand and refusal on the bills is not sufficient in law, and would not bind the bank, and the holder is not deprived of his remedy, under the Act of 16th April, 1850, by refusing to allow such endorsement. *Commonwealth v. Bank of Commerce*, 322.
- 4. Under such circumstances, on complaint of the creditor, it will be held that there was a demand made on the bank for the redemption of its bills, which was refused, and that there was a wilful evasion to endorse the bills thus presented for redemption, and that the bank should go into liquidation. *Ibid.*

**BILLS AND NOTES.—See NOTES AND BILLS.**

**BILL OF LADING.**

- 1. The owners of a steamboat are liable, as common carriers, for the loss of freight occasioned by collision with another boat, even though it occur without default on the part of the owners or those navigating the carrier boat. *Hayes v. Kennedy*, 262.
- 2. But where the bill of lading contracts to deliver safely, "the unavoidable dangers of the river navigation excepted," and loss by collision occurs without default of the carrier boat, the loss is within the exception, and the owners of the boat are not liable, even though the collision was occasioned by the negligence of those navigating the other boat. *Ibid.*
- 3. The phrases "perils of the sea," "dangers of the river," and "dangers of the river navigation," discussed. *Ibid.*

**BILL OF LADING—continued.**

4. A bill of lading is a contract which must be construed by the court like any other written contract, according to its true meaning. *Lucasco Oil Co. v. Pennsylvania Railroad Co.*, 477.
5. Common carriers may limit their liabilities by special agreement. *Ibid.*

**BILL OF REVIEW.**

1. Where an administrator's account is referred to an auditor, who hears the parties and makes a report which is confirmed by the court, the parties are not entitled to a bill of review under the Act of the 13th of October, 1840. *Cunningham's Appeal*, 177.
2. Where an administrator, in accordance with the decree of Orphans' Court, makes distribution of the decedent's personal estate, the settlement thus made can only be disturbed by a bill of review within five years. *Hendrickson's Estate*, 360.
3. After that time, an Act of Assembly passed, ordering the court to review its decree of distribution, is an attempt to violate private rights judicially settled, and to override the judicial power of the Commonwealth, and is, therefore, unconstitutional and void. *Ibid.*

**BONDS.**—See **RAILROAD SUBSCRIPTIONS**; **RAILROAD BONDS**.

**BOUNTIES.**

The Act of Assembly of April 28, 1861, permitting the issue of bonds by certain officers of the counties, townships, wards, &c., throughout the state, for the purpose of securing bounties to volunteers, and prescribing the mode of such issue, is not unconstitutional. *Edmondson v. School Directors of Elizabeth*, 528.

**BROKERS.**—See **BANKERS AND BROKERS**; **TAXES**.

**CARRIER.**—See **COMMON CARRIER**.

**CASE.**

An action on the case will lie against an officer who disregards the provisions of the Act of April 9, 1849, by selling personal property required by the defendant in the execution to be appraised and set off to him. *Vandressor v. King*, 56.

**CASES CONSIDERED.**—See **TABLE OF CASES CONSIDERED**.

**CHARGE ON LAND.**

The acceptance by an heir of a portion of a decedent's estate, charged with the payment of the interest on the one-third of its valuation to the widow for life, creates a personal liability on the part of the heir for its payment. *Pennsylvania Annuity Company v. Vansyckel*, 535.

## CITIES.—See COUNTIES AND TOWNSHIPS, 1; PRACTICE, 12-20.

1. In conformity with the decision of the Supreme Court of Pennsylvania, the Act of Assembly of Pennsylvania of 15th April, 1834, which provides a mode for enforcing the payment of judgments against counties and townships, will, in this court, be applied to cities also. *Evans v. Pittsburgh*, 405.
2. The construction by the state Supreme Court of their own peculiar statutes is conclusive in this court. *Ibid.*
3. The annual estimate by county commissioners as to the funds needed for the coming year, whether right or wrong, is not an "appropriation" of them to pay any particular debt due by the county; consequently, the judgment of the court is the first appropriation and should have precedence: *Pollock v. Lawrence County* (*supra*, p. 137), re-affirmed. *Ibid.*
4. To enforce execution against the city, if there be no unappropriated funds in the treasury or none appropriated to the payment of the judgment in the case, the mandatory process should issue to the city councils, as the legislative power, and the mayor and controller, the proper executive officers, whose duty it is to "cause the money to be paid," and who only have the power. *Ibid.*
5. If, after a due performance of their several duties, the treasurer, who is their officer and servant, should refuse to perform any duty imposed on him, or attempt, by ingenious devices, to evade the performance of it, he may be treated as for a contempt by serving the proper process upon him for the purpose. *Ibid.*

## COMMERCIAL PAPER.—See NOTES AND BILLS.

## COMMON CARRIERS.

1. The owners of a steamboat are liable, as common carriers, for the loss of freight occasioned by collision with another boat, even though it occur without default on the part of the owners or those navigating the carrier boat. *Hayes v. Kennedy*, 262.
2. Where the bill of lading contracts to deliver safely, "the unavoidable dangers of the river navigation excepted," and loss by collision occurs without default of the carrier boat, the loss is within the exception, and the owners of the boat are not liable, even though the collision was occasioned by the negligence of those navigating the other boat. *Ibid.*
3. The phrases "perils of the sea," "dangers of the river," and "dangers of the river navigation," discussed. *Ibid.*
4. A bill of lading is a contract which must be construed by the court like any other written contract, according to its true meaning. *Lucasco Oil Company v. Pennsylvania Railroad Company*, 477.
5. Common carriers may limit their liabilities by special agreement. *Ibid.*
6. Where a car containing oil was thrown from the track through the

COMMON CARRIERS—*continued*.

breaking of an axle, and while remaining where it was left after the accident, two men came along, and out of curiosity drew a match across the car to test whether the freight was oil or whiskey, and the oil ignited and an explosion occurred, by which the oil was destroyed, it was held that although the accident arose from a crack in the axle which it was "impracticable" to discover, if the agent of the company who had tested the axle had used reasonable care under the circumstances, and otherwise reasonable care had been used, the plaintiff was not entitled to recover. *Lucas Oil Company v. Pennsylvania Railroad Company*, 477.

7. Where the car containing the oil had remained standing where left after the accident, for some time, and was destroyed as stated above, if reasonable care under the circumstances had been used in the preservation of the oil, the plaintiff was not entitled to recover. *Ibid*.
8. The measure of damages for oil lost by neglect of carriers is the value at the nearest practicable market, with freight thereto deducted from, and interest added to the net value from the time of accident to the time of decision. *Ibid*.

## CONFLICT OF LAWS.—See DIVORCE, 1.

## CONSCRIPTION ACT.

1. The Act of Congress of the 3d March, 1863, commonly called the "Conscription Act," construed. *United States v. Will*, 467.
2. There is no penalty provided for resisting the enrolment. *Ibid*.
3. The 25th section, imposing a penalty, has reference to the draft, and the draft alone. *Ibid*.
4. It can bear no other grammatical construction, and that is its fair legal interpretation. *Ibid*.

## CONSIDERATION.—See NOTES AND BILLS, 1.

## CONSTITUTIONAL LAW.—See CORPORATIONS; EMINENT DOMAIN; LEGISLATIVE POWER; LEGAL TENDER; CONSCRIPTION ACT.

1. An Act of Assembly, passed since the adoption of the amended Constitution, revising an act passed previously thereto, which had expired by limitation, must be construed in subordination to its requirements, in the same way as if the original act had never been passed. *Watson v. Pittsburgh and Connellsville Railroad Company*, 99.
2. A provision in the charter of a railroad company, organized under Act of Assembly passed since the adoption of the amended constitution, which authorizes the company, upon tender simply of the damages awarded by viewers, to enter upon and appropriate land and materials for the construction of their road, without awaiting the issue of an appeal taken by the land owner, is clearly unconstitutional. *Ibid*.
3. Where an administrator, in accordance with the decree of the Orphans' Court, makes distribution of the decedent's personal estate, the settle-

CONSTITUTIONAL LAW—*continued.*

ment thus made can only be disturbed by a bill of review within five years. *Hendrickson's Estate*, 360.

4. After that time an Act of Assembly passed ordering the court to review its decree of distribution, is an attempt to violate private rights judicially settled, and to overrule the judicial power of the Commonwealth, and is therefore unconstitutional and void. *Ibid.*

## CONSTRUCTION.

1. An Act of Assembly, passed since the adoption of the amended constitution, revising an act passed previously thereto, which had expired by limitation, must be construed in subordination to its requirements, in the same way as if the original act had never been passed. *Watson v. Pittsburgh and Connellsville Railroad Company*, 99.
2. A provision in the charter of a railroad company, organized under Act of Assembly passed since the adoption of the amended constitution, which authorizes the company, upon tender simply of the damages awarded by viewers, to enter upon and appropriate land and materials for the construction of their road, without awaiting the issue of an appeal taken by the landowner, is clearly unconstitutional. *Ibid.*

## CONTINUANCE.

Where on trial, plaintiff at bar amends his declaration in matter of substance to which defendant alleging surprise, refuses to plead or demur, but moves for a continuance, it is the duty of the court to grant the motion. *Pittsburgh and Steubenville Railroad Co. v. Clark*, 48.

## CONTRACT.—See INSURANCE, 1, 2, 3.

1. Where a lessee, under his authority to bore salt wells, brings oil to the surface, the oil belongs to the owner of the soil. *Peterson v. Keir*, 191.
2. The lessee is not bound to collect and keep the oil for the owner; he may let it run to waste; but if he does collect it and appropriate it for his own benefit, he is liable therefor, and trover will lie to recover its value. *Ibid.*
3. Considerations, valuable and good, defined and distinguished. *Wilson v. Wilson's Admr.*, 201.
4. A good consideration, viz: of natural love and affection, is not sufficient to support an executory contract, as between the parties, or other volunteers claiming under them, either at law or in equity. *Ibid.*
5. The seal upon a note imports consideration, and the words "value received" aver the consideration pecuniary, but this only goes to shift the burthen of proof from the plaintiff to the defendant, who may show that no such consideration passed between the parties. *Ibid.*
6. Where defendant contracted to give plaintiff a railroad truck and a horse in exchange for a patent right assigned by plaintiff, but failed



**CONTRACT—continued.**

- from want of title to deliver the truck, the plaintiff cannot recover under a count for money had and received. *Pratt v. Trunick*, 289.
7. The plaintiff should file a special count, averring the exchange agreed on, the failure of title to the truck, its value, and notice to defendant. *Ibid.*
  8. In order that property given and received as money may be recovered as money, the agreement to treat it as such must be clear. *Ibid.*
  6. Where a widow and her minor children render service to another, upon his promise to her to pay her for her own and the children's services, she is entitled to recover for their services, as well as for her own. Her right to recover is based on the privity of contract and the express promise, for which there was a sufficient consideration. *Mant's Executor v. Stinson's Executor*, 294.
  10. Where one purchases real estate by articles of agreement made with a husband only, in which is a covenant for a title clear of encumbrance, and the vendor's wife refuses to execute the conveyance, the purchaser may refuse to take the land, and bring his action on the covenant. But if by promise of a consideration he induces the wife to join in the deed he is liable to her therefor. *Mageogney v. Reed*, 389.

**CONTRACTORS.**

Where an injury is occasioned through the negligence of contractors, their workman or servants, the contractors are responsible; and no action will lie against the individual or corporation for whom the work is being done. *Painter v. Pittsburgh*, 339.

**CONVEYANCE.—See DEED.****CORPORATION.—See MUNICIPAL CORPORATION; RAILROAD CORPORATION.**

1. The principle of law authorizing the taking of private property for public use, upon compensation made or adequate security given, operates in like circumstances, upon the property of corporations with equal force, as upon that of individuals. *Citizens' Passenger Railway Company*, 10.
2. The grant of the franchise of a ferry, bridge, turnpike, or railway, is not in its nature exclusive, so as to preclude the state from interfering with it by the creation of another similar franchise tending materially to impair its value. The charter is not a contract standing above and beyond legislative interference, nor a grant of the fee simple in the soil, but a mere easement; and the legislature has full power to grant as many more easements, on the same territory, as public convenience may require, always making indemnity for damage done to those corporations which were the first objects of its bounty, or the recipients of antecedent grants. *Ibid.*
3. The legislature has no authority to barter away its essential attribute of sovereignty; and each legislature should assemble with the same

CORPORATION—*continued.*

measure of sovereign power which was held by its predecessors. *Citizens' Passenger Railway Company*, 10.

4. Where an injury is occasioned through the negligence of contractors, their workmen or servants, the contractors are responsible; and no action will lie against the individual or corporation for whom the work is being done. *Painter v. Pittsburgh*, 339.

## COUNTIES AND TOWNSHIPS. See PRACTICE, 24-43.

1. The remedy for enforcing judgments against counties and townships, provided by the Act of April 15th, 1834, is not applicable to cities. *Oelrichs & Co. v. Pittsburgh*, 93.
2. The annual estimate of the probable expenses of the county for the ensuing year, required by law to be made by the commissioners, is not an appropriation. *Pollock v. Lawrence Co.*, 137.
3. An appropriation is to set apart or vote a sum of money for a particular object. *Ibid.*
4. There is no appropriation of any part of the common fund, until the commissioners, by their warrant on the treasurer, indicate the specific object to which it is to be applied or set apart. It is then severed from the mass and "appropriated," and not before. *Ibid.*
5. When unfortunately the current expenses exceed the current income, and all cannot be promptly paid, to the vigilant must be given the first products of the treasury. *Ibid.*
6. No capricious application of the public funds by the commissioners, in the face of a debt solemnly adjudicated, and after notice of an execution commanding its payment, will be permitted. *Ibid.*
7. The execution provided by the Act of 1834, relative to counties, operates as an injunction upon the commissioners, restraining them from drawing any warrant, or making any payment for any purpose whatever, until the judgment is satisfied. *Ibid.*
8. The jurisdiction of a court is not exhausted, by the rendition of its judgment, but continues until the judgment shall be satisfied. *Ibid.*
9. The writ authorized by the Act of 1834 is not the prerogative writ of *mandamus*, for that can issue without a judgment, but this cannot. *Ibid.*
10. Neither is it an original proceeding against the commissioners, but an execution and final process to enforce the payment of a judgment. *Ibid.*
11. There can be no just ground of complaint, when the courts of the United States adopt the process of the courts of the state. *Ibid.*
12. A refusal to obey the command of the execution, will be followed by an attachment against the commissioners. *Ibid.*
13. A debt due to the Commonwealth is a claim of the highest order, and cannot be affected either by the Statute of Limitation or a certificate of bankruptcy. Her privileges in this respect, are all such as necessarily result from the prerogative of sovereignty. *Commonwealth ex rel. v. Floyd*, 342.
14. The treasurer of the Western Penitentiary is but a trustee for the

COUNTIES AND TOWNSHIPS—*continued.*

- use of the Commonwealth, and a debt due by a county to the penitentiary for maintaining convicts therein is in fact a debt due to the Commonwealth herself; and although a suit brought therefor be in the name of the Penitentiary, the Commonwealth is the actual party plaintiff, and entitled to insist on her prerogatives. *Commonwealth ex rel. v. Floyd*, 342.
15. The Act of Assembly of the 23d April, 1829, in relation to the Eastern and Western Penitentiaries, distinguishes claims for keeping convicts from ordinary claims against counties, and in effect appropriates the necessary amount in the county treasury for payment of such claims. *Ibid.*
  16. Therefore it is the duty of the county treasurer, to retain sufficient funds of the county in his hands, to pay a warrant for such claim of the penitentiary, in preference to paying the money upon a writ of special *fi. fa.* for an ordinary debt, and in case of his refusal so to do a mandamus will issue against him. *Ibid.*
  17. That funds necessary to defray the ordinary and current expenses of the county, should not be withdrawn from the treasury by mandamus executions, is supported by strong reasons as well as authority. *Ibid.*
  18. It may well be questioned whether money, levied as our county taxes are, for the express purpose of the defraying certain specified current expenses of the county, can be treated as "money unappropriated of the county," except where there is an excess, not required for the payment of the objects included in the estimate. *Ibid.*
  19. It is the first duty of township supervisors and auditors to keep the highways in good repair, and to administer to the wants of the needy poor. *Larimer v. Pitt Township*, 352.
  20. If the township be indebted, they should levy an amount of tax, as far as allowed by law, sufficient to enable them to perform their duty and to discharge their indebtedness. *Ibid.*
  21. Where they have levied the tax up to the legal limit, the residue only, after appropriation of the necessary amount for the roads and the poor, is applicable to payment of other indebtedness. *Ibid.*
  22. Executions against the township are liens on this surplus fund, if there be any in the order in which they are issued against the present officers; an execution or order against the former officers has no priority. One having such order should keep it in force by an *alias* order to the incoming officers. *Ibid.*
  23. Upon service of a mandamus execution upon county commissioners, as prescribed by the Act of Assembly of Pennsylvania of the 16th April, 1834, it is their duty
    - a. If there be any money in the treasurer's hands unappropriated by previous orders, to cause it to be paid to the party.
    - b. If there be not money enough in the treasury to satisfy the whole judgment, to pay it out of the first money received.
    - c. If the taxes of the current year are insufficient to pay the judg-

COUNTIES AND TOWNSHIPS—*continued*.

- ments and other expenses of the county, to assess and collect on the next year a sufficient sum for this purpose. *Loute v. Allegheny County*, 411.
24. The judgment of the court is an appropriation of all the money in the treasury not already drawn or appropriated by previous county orders, in payment of previous demands audited and allowed by the controller; and also of the first money thereafter received for the use of the county. *Ibid*.
25. The commissioners will be held guilty of contempt, should they seek to evade the process of the court by dividing the funds to be collected by taxes and appropriating them before their collection. *Ibid*.
26. After service of the mandamus execution, the treasurer has no authority to receive county orders of a subsequent date in payment of taxes. *Ibid*.
27. The provision of the Act of 1st of January, 1862, requiring the treasurer of Allegheny county to receive warrants in payment of taxes, was not intended to repeal any of the provisions of the Act of April, 1834; nor can it relieve the treasurer from the proper application of the county funds in the order of their appropriation, as previously made. *Ibid*.
28. It can have no retroactive effect; nor can the legislature be presumed to intend to aid public officers in an astute scheme to evade the performance of their official duties. *Ibid*.
29. The court will not grant a mandamus to compel the county commissioners to draw orders on the treasury, where the unqualified answer of the commissioners remains uncontradicted, that there are no unappropriated funds in the treasury. *Mitchell v. Commissioners*, 417.
30. Whether mandatory executions, on writs of special *feri facias* of the United States Circuit Court, are an appropriation of all the moneys coming into the treasury of the county, after the service of said writs, until the same are fully paid and satisfied, or whether they only appropriate and bind the excess of said moneys not absolutely needed and required to defray the ordinary and current expenses of the county, not decided. *Ibid*.
31. Writs of execution issued by the United States Circuit Court, under the 6th section of the Act of 15th April, 1834 (adopted as a rule of practice in said court), and served upon the treasurer of Allegheny county, neither bind the money of the county in his hands nor restrain him from paying it out to any person demanding the same on a proper warrant. *Commonwealth ex. rel. Coon v. Floyd*, 422.
32. The only mode of paying demands against a county is by warrants drawn by the commissioners on the treasurer. *Ibid*.
33. Only unappropriated moneys of the county should be applied by the commissioners to the payment of judgments or executions. *Ibid*.
34. The annual estimate by the commissioners of the probable expenses of the county for the ensuing year, is an appropriation of the money

COUNTIES AND TOWNSHIPS—*continued.*

which may be collected for the specific purpose for which it was levied and collected. *Commonwealth ex rel. Coon v. Floyd*, 422.

35. Mandamus is the proper remedy against a county treasurer, when he improperly refuses to pay warrants drawn on him by the commissioners. *Ibid.*
36. The Act of Assembly of April 28, 1864, permitting the issue of bonds by certain officers of the counties, townships, wards, &c., throughout the state, for the purpose of securing bounties to volunteers, and prescribing the mode of such issue, is not unconstitutional. *Edmondson v. School Directors of Elizabeth*, 528.

## CRIMINAL LAW.

1. That clause of the Act of Assembly giving exclusive jurisdiction to the Courts of Oyer and Terminer in "all voluntary and malicious burnings punishable in the same manner as arson," Criminal Procedure Act of 1860, section 31, has reference to the extent and degree as well as to the kind of punishment. *Commonwealth v. McConnell*, 210.
2. Where a felony and a misdemeanor are both made punishable by a fine and imprisonment, they cannot be said to be punishable in the same manner, if the extent of imprisonment limited to each is different; although the court might in its discretion make the time in both identical. Yet it is to be presumed the court will subject the graver offence to the greater punishment; felony and misdemeanor are not punishable in the same manner, although they may be so punished. *Ibid.*
3. The crime described in section 137 of the Penal Code of 1860, is a felony, and to be tried in the Court of Oyer and Terminer. *Ibid.*
4. The offence described in section 138, is a misdemeanor, and to be tried in the Court of Quarter Sessions. *Ibid.*
5. In Pennsylvania a prisoner charged with a capital offence, has a constitutional right, even after indictment found, to be admitted to bail where the evidence produced on the hearing satisfies the judge to whom the application is made, that the offence is not capital. *Commonwealth v. Lemley*, 362.
6. In an indictment for passing counterfeit coin, evidence of the possession of counterfeit bank notes is not admissible to prove the *scienter*. *United States v. Goughnour*, 369.
7. But the possession of quantities of counterfeit coin, of a different denomination from that laid in the indictment, is admissible for such purposes. *Ibid.*
8. The unlawful carnal knowledge of a woman, forcibly and against her will, under the 91st section of the Penal Code, is the same offence as rape at common law. *Commonwealth v. Childs*, 391.
9. Where the consent of the female is obtained, though by fraud or deception, there is no rape: but connection with a woman when insensible or unconscious, from whatever cause, is rape. *Ibid.*

CRIMINAL LAW—*continued.*

10. Absence of assent will constitute rape, except where the female is under ten years of age; but assent after the act is no defence. Where consent is given and withdrawn before the act, if the same is forcible and against consent, the offence is complete. *Commonwealth v. Childs*, 391.
11. Where there is nothing to deter the woman from resistance, and she is conscious and able to show dissent, and does not do so, it will be taken as her assent. A doubtful or mixed case will not make out the offence. *Ibid.*
12. The jury are the sole judges of the credibility of witnesses, and are not bound to believe the testimony of any witness, although it may not be expressly contradicted by other evidence. *Ibid.*
13. Defendants in rape are put to rely upon circumstantial evidence for their defence, and any fact tending to the inference that there was not the utmost reluctance and resistance, should be received in evidence. The material issue is the willingness or reluctance of the female. *Ibid.*
14. The jury should be satisfied beyond a reasonable doubt to convict. *Ibid.*
15. Corroborating circumstances are not absolutely necessary, but their absence is ground of suspicion. The absence of any corroboration most singular, and doubted whether a jury should convict in any such case. *Ibid.*
16. Where the prosecutrix swears to facts, which, if true, are susceptible of proof by others, and the proof is not produced, it is, unexplained, a circumstance of suspicion, but by no means conclusive. Long delay of prosecution, a matter to be considered by the jury. *Ibid.*
17. Medical testimony not a matter of importance, where the body of the offence can be made out without it. *Ibid.*
18. Reasonable doubt explained. *Ibid.*
19. In cases of fornication and bastardy, when the mother is a *feme covert*, her declarations made at the time of parturition, and afterwards persisted in as to who was the father of the child, are not competent testimony, under section 37 of the Criminal Code of 1860. *Commonwealth v. Reed*, 470.
20. Death-bed declarations as to who committed an offence are only competent in cases of homicide. *Ibid.*
21. Neither husband nor wife is competent to prove non-access on the part of the husband, either in a civil or criminal case. *Ibid.*
22. Bridge, railroad and passenger railway companies may issue tickets, "good for one trip," without violating the provisions of the Act. *United States v. Monongahela Bridge Company*, 475.
23. These tickets are not designed to supplant the circulating medium, but are matters of convenience equally to the passenger and the companies. *Ibid.*
24. If they bore any resemblance or similitude to the coin of the United States, or the postage currency authorized by Congress, or if the pur-

CRIMINAL LAW—*continued*.

- pose indicated upon their face, was to cause them to circulate as money, the corporation issuing them would be amenable to the penalties of the act. *United States v. Monongahela Bridge Company*, 475.
25. A delivery of horses to a horse dealer for sale, the proceeds to be returned to the owner, is not a bailment. *Commonwealth v. Cart*, 495.
26. Therefore the 108th section of the Act of 1860, providing that "if any person, being a bailee of any property, shall fraudulently take or convert the same to his own use or to the use of any other person, except the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny, and punished as is provided in cases of larceny of like property," does not apply to such a case. *Ibid*.
27. A count commingling two separate and distinct offences, the one felony and the other a misdemeanor, is bad. *Ibid*.
28. A count charging misdemeanor, where all the other numerous counts charge felony, is bad, except in certain cases, *ex necessitate*, where one offence is the result of or so intimately connected with the other as to render it impossible to ascertain of which offence defendant may be guilty, until the evidence be heard. *Ibid*.
29. Law of homicide in Pennsylvania defined. *Commonwealth v. Moore*, 502.
30. Adultery, by the law of Pennsylvania, will not justify homicide. *Ibid*.
31. Insanity in law defined, analyzed, discussed and applied to the question of homicide. *Ibid*.

## DAMAGES.—See RAILROAD DAMAGES.

## DECEDENT.

1. Where the heirs at law of a decedent are all nephews and nieces, the distribution is *per capita* and not *per stirpes*. *In re Chess Estate*, 130.
2. The acceptance by an heir of a portion of a decedent's estate charged with the payment of the interest on one-third of its valuation to the widow for life, creates a personal liability on the part of the heir for its payment. *Pennsylvania Annuity Co. v. Vansyckel*, 535.

## DEED.

1. Where a deed is made from a father to a son, in trust to the son's children, on payment of a valuable consideration by the son, equity will regard the consideration paid as a settlement by the father upon the children, and will support the trust; and for this purpose will, if necessary, construe the deed as a covenant on the part of the son to stand seised to the uses of the children. *Caldwell v. Caldwell*, 553.
2. Such being the legal effect of the conveyance, parol evidence offered to show that a life estate was intended to be vested in the trustee for his own benefit, should be rejected as contradictory and subversive of the deed. *Ibid*.

DEPOSITION.—See EVIDENCE.

DISTRIBUTION.—See DECEDENTS; EXECUTOR AND ADMINISTRATOR.

Where the heirs at law of a decedent are all nephews and nieces, the distribution is *per capita* and not *per stirpes*. *In re Chess Estate*, 130.

DISTRICT COURT.—See JURISDICTION.

DIVORCE.

1. A decree of divorce by a court of another state, on petition filed by a resident of this state, against whom proceedings for divorce had been previously instituted in Pennsylvania, will not bar a decree in the action here. *Rebstock v. Rebstock*, 124.
2. In a suit for a divorce *à mensu et thoro*, and for alimony, for the alleged reason that respondent turned his wife, the petitioner, out of doors, the mode or manner of the particular act need not be set forth in the pleadings, but evidence of facts which amount to a virtual turning out may be received under such allegation. *Grove v. Grove*, 172.
3. Nothing short of adultery, or some such heinous offence against her marriage vows, will work a forfeiture of the wife's right to return to her husband's house and take up her abode with him. *Ibid*.
4. The husband's refusal to receive her back, where she has not forfeited her right to return, amounts to a virtual turning of her out, and makes him liable to a decree of divorce from bed and board and for alimony. *Ibid*.

DRAFT, MILITARY.—See HABEAS CORPUS, 1, 2, 3, 4; INFANT.

1. The Act of Congress and army order which directs the commissioner to cause "to be drawn from the wheel a number of ballots equal to the number of drafted men fixed by the governor, to be drawn as the proper quota," does not authorize the commissioner to take additional names from the wheel to make up for any that may be rejected by the mustering officer. *Markley's Case*, 380.
2. His power ceases the moment he has drawn the *pro rata* number required of such district, and all names taken out afterwards cannot be treated as a drawing under the law, but in express violation of its provisions, and any one so drawn stands in the situation of a person forced into the service without being drafted. *Ibid*.
3. Where the draft is void, it requires some new contract of service voluntarily entered into to make it binding. *Ibid*.
4. The order of the president, under the Act of Congress conferring on him the power of prescribing the *modus operandi* of calling out the militia, has all the force of an Act of Congress. *Wendt's Case*, 402.
5. A drafted militiaman so called out cannot pay a fine in lieu of service. *Ibid*.

EJECTMENT.

1. In ejectment, based upon an alleged trust, depending on no written



**EJECTMENT**—*continued.*

- evidence, but sought to be made out from the acts and declarations of the parties, through a series of years, and down to the death of the alleged trustee in possession, the question of the trust is one peculiarly for the jury. *Achmutz v. Achmutz*, 58.
2. In such case, if on a review of the parol evidence, the court should pronounce it insufficient to divest a paper title, thereby ruling the case against the defendant without the aid of the jury, the Supreme Court would be obliged, on writ of error, to re-examine the evidence minutely. *Ibid.*
  3. Where juries overthrow paper titles in behalf of those resting in parol, the Supreme Court will sometimes look into the proofs on which they proceeded, but where a party is unable to persuade a jury that he has a parol title he will find no relief in a writ of error. *Ibid.*

**EMINENT DOMAIN.**

1. The power of the legislature to lay out a public street cannot be questioned, as it is a proper exercise of the right of eminent domain for the public good. *Extension of Pennsylvania Avenue*, 1.
2. The principle of law authorizing the taking of private property for public use, upon compensation made or adequate security given, operates in like circumstances upon the property of corporations with equal force, as upon that of individuals. *Citizens' Passenger Railway Company*, 10.
3. The grant of the franchise of a ferry, bridge, turnpike or railway, is not in its nature exclusive, so as to preclude the state from interfering with it, by the creation of another similar franchise tending materially to impair its value. The charter is not a contract standing above and beyond legislative interference, nor a grant of the fee simple in the soil, but a mere easement; and the legislature has full power to grant as many more easements on the same territory as public convenience may require, always making indemnity for damage done to those corporations which were the first objects of its bounty, or the recipients of antecedent grants. *Ibid.*
4. The legislature has no authority to barter away its essential attributes of sovereignty; and each legislature should assemble with the same measure of sovereign power which was held by its predecessors. *Ibid.*

**ENLISTMENT.**—See **INFANT.**

**ENROLMENT.**—See **CONSCRIPTION ACT.**

**EQUITY.**

1. When the answer to a bill in equity is fully responsive, the answer will prevail, unless it is overcome by the testimony of two witnesses to the substantial facts, or at least of one witness, and other attendant circumstances, which supply the want of another witness. *Lonerger v. Fenlon*, 115.

EQUITY—*continued.*

2. The Circuit Court of the United States, having jurisdiction in equity of controversies arising under the United States Patent Laws, do not act as ancillary to a court of law, and therefore, do not require the patentee first to establish his legal right in a court of law, and by the verdict of a jury. *Sanders v. Logan*, 241.
3. Where the injury done to a patentee by infringement of his patent is not in the use of his invention, but in making use of it without compensating the patentee therefor, it being the interest of the patentee that his invention should be adopted, and used by all, the measure of "actual damage" is the price or value of a license to use it. *Ibid.*
4. In such cases, the measure of damage being a certain sum, an account of profits is not required, and the jurisdiction of a chancellor need not be invoked. *Ibid.*
5. Injunction is not the proper remedy in such cases. It is a remedy used only for prevention and protection, and not to enforce the payment of money, nor for extortion. *Ibid.*
6. A court of law may treble a verdict for "actual damages" in a patent suit, where the defendant has acted wantonly or vexatiously, but a court of equity can inflict no exemplary or punitive damages, as a court of law may. *Ibid.*
7. Property in the hands of a receiver appointed by a court of chancery is not liable to seizure and sale under execution on a judgment at law. *Robinson v. The O. & P. Railroad Company*, 257.
8. Notice previous to motion for an injunction, required by 5th section of the Act of Congress, 2d March, 1793, may be waived by appearance and filing answer. *Bradley v. Reed*, 519.
9. As a general rule in the practice of courts of equity, nothing can be read on such motion but the answer, and if the answer denies the equity of the bill, the injunction will be dissolved. *Ibid.*
10. Waste is an exception, upon the ground that an irreparable mischief would ensue, and the court will interpose to prevent it. *Ibid.*
11. To show waste, affidavits are admissible, even after answer filed. *Ibid.*
12. A court of equity will not permit a vendee in possession, with the great bulk of the purchase-money due and unpaid, to cut and take away timber, and thus diminish the security of the vendor. *Ibid.*
13. So also, an injunction lies against a mortgagor in possession, to stay waste. The court will not suffer him to prejudice the security. *Ibid.*
14. Since the Statute of Westminster II., giving one tenant in common a legal remedy against his co-tenant, courts of equity have interposed to prevent waste and preserve the corpus of the estate until partition. *Ibid.*
15. Pending a bill in equity, one tenant in common will not be permitted to strip the land of its timber. It is an injury recognised by law, and the remedy by injunction is applicable to every specie of waste. *Ibid.*
16. Courts of equity will dissolve an injunction, where it appears that

**EQUITY—continued.**

the complainant has been guilty of intentional delay in prosecuting his cause. *Bradley v. Reed*, 519.

**ERROR AND APPEAL.—See SUPREME COURT; EJECTMENT; APPEAL.**

1. That the court did not comment upon all the evidence, and bring each fact specially to the attention of the jury, has always been held no reason for reversal. *Merkon v. Hood & Co.*, 207.
2. Where an alleged error consists in the submission of a question of fact without adequate evidence, the plaintiff should obtain from the judge a bill of exceptions containing all the evidence which was submitted to the jury on the point; and when the plaintiff neglects this duty, the rule "*omnia præsumuntur*" will be applied against him. *Cumming's Executor v. Meaks*, 490.
3. The loose character of the present mode of bringing evidence before the Supreme Court condemned, and the suggestion made, that the evidence appropriate to the questions to be decided, be settled before the judge after trial, on notice to the opposite counsel, and by him certified under his hand and seal. *Ibid.*

**EVIDENCE.—See DEED, 1, 2.**

1. In ejectment based upon an alleged trust, depending on no written evidence, but sought to be made out from the acts and declarations of the parties, through a series of years and down to the death of the alleged trustee in possession, the question of the trust is one peculiarly for the jury. *Achmutz v. Achmutz*, 58.
2. In such case, if, on a review of the parol evidence, the court should pronounce it insufficient to divest a paper title, thereby ruling the case against the defendant, without the aid of the jury, the Supreme Court would be obliged or writ of error, to re-examine the evidence minutely. *Ibid.*
3. Where juries overthrow paper titles in behalf of those resting in parol, the Supreme Court will sometimes look into the proofs on which they proceeded; but where a party is unable to persuade a jury that he has a parol title, he will find no relief in a writ of error. *Ibid.*
4. The sheriff's return to a writ, as between the parties, is conclusive, and parol testimony to contradict or control it, is inadmissible. It can only be impeached in an action against the sheriff. *Hill & Curry v. Robertson*, 103.
5. In an action of slander for maliciously charging the plaintiff, a practising physician, with being a quack and having killed the defendant's child, evidence offered to enhance damages that a rumor prevailed extensively, in the neighborhood, that defendant had so spoken of plaintiff, is inadmissible. *Miller v. Varner*, 149.
6. One cannot be responsible for the repetition by others of a slander uttered by him. *Ibid.*

EVIDENCE.—*continued.*

7. *Chapman v. Calder*, 2 Harris 365, is so defectively reported as to be no authority on this point. *Miller v. Varner*, 149.
8. The seal upon a note imports consideration, and the words "value received" aver the consideration pecuniary; but this only goes to shift the burthen of proof from the plaintiff to the defendant, who may show that no such consideration passed between the parties. *Wilson v. Wilson's Adm'r*, 201.
9. The rule, as broadly laid down, making the whole of a party's admission, deposition, statement or answer, evidence when his antagonist has used part, for the reason given that without the context, the precise meaning of the part used may not be apprehended, does not apply when the context relates wholly to other matter. *Mershon v. Hood & Co.*, 207.
10. In an indictment for "passing counterfeit coin, evidence of the possession of counterfeit bank notes is not admissible to prove the *scienter*. *United States v. Goughnow*, 369.
11. But the possession of quantities of counterfeit coin of a different denomination from that laid in the indictment, is admissible for such purposes. *Ibid.*
12. In cases of fornication and bastardy, when the mother is a *feme covert*, her declarations made at the time of parturition, and afterwards persisted in, as to who was the father of the child, are not competent testimony under section 37 of the Criminal Code of 1860. *Commonwealth v. Reed*, 470.
13. Death-bed declarations as to who committed an offence, are only competent in cases of homicide. *Ibid.*
14. Neither husband nor wife is competent to prove non-access on the part of the husband, either in a civil or criminal case. *Ibid.*
15. An agent's liability to his principal for negligence by which a third person has been injured, is only contingent, while it is direct and certain to the party injured. *Dodge v. Bache*, 487.
16. An action against the principal by the party injured is *res inter alios acta* as to the agent, and the record is not admissible in evidence against him, except as to the amount of damages. *Ibid.*
17. Therefore, the rule that excludes an agent from testifying for his principal in such an action, is not founded in clear reason, and should not be extended; and his testimony should not be rejected, except upon the *quantum* of damages, unless his liability over has been clearly proved. *Ibid.*

EXECUTION.—See PRACTICE, 11-19, 23-42, 45-51.

1. Where stay of execution has been obtained, under the Act of 1836, by giving security, a further stay under the Act of 21st May, 1861, cannot be had, unless the present surety bind himself in such way as effectually to preserve unimpaired all the rights and legal remedies of the plaintiff against him under his recognisance. *Burnside's Case*, 254.

GUARANTY—*continued.*

- attached to the bonds of Allegheny county, which were given by the county in payment of her subscription to the capital stock of the railroad company. *Evans v. The Cleveland and Pittsburg Railroad Company*, 483.
2. The bonds and coupons being made payable to bearer, they pass by mere delivery, and no assignment is necessary to enable the holder to sue. *Ibid.*
  3. The contract being made in Ohio, to be executed in New York, and by the laws of both those states, such a contract being an original undertaking, in order to maintain an action on the guarantee, it is not necessary for the holder to sue the county of Allegheny in the first instance, or pursue it to insolvency: nor is any demand or notice required. *Ibid.*
  4. The courts of the United States receive the statutes and judicial precedents of the different states as evidence of the law of each state without special plea or proof of witnesses. *Ibid.*

## HABEAS CORPUS—See INFANT.

1. The Act of Congress and Army Order which directs the commissioner to cause "to be drawn from the wheel a number of ballots equal to the number of drafted men fixed by the governor to be drawn as the proper quota," does not authorize the commissioner to take additional names from the wheel, to make up for any that may be rejected by the mustering officer. *Markley's Case*, 380.
2. His power ceases the moment he has drawn the *pro rata* number required of such district, and all names taken out afterwards cannot be treated as a drawing under the law, but in express violation of its provisions, and any one so drawn stands in the situation of a person forced into the service without being drafted. *Ibid.*
3. Where the draft is void, it requires some new contract of service voluntarily entered into to make it binding. *Ibid.*
4. A proceeding defective for irregularity, and one void for illegality, may be reversed upon error or certiorari, but it is the latter defect only which gives power to discharge on *habeas corpus*. *Ibid.*

## HEIR AT LAW.

The acceptance by an heir of a portion of a decedent's estate charged with the payment of the interest of one-third of its valuation to the widow for life, creates a personal liability on the part of the heir for its payment. *Pennsylvania Annuity Company v. Vansyckel*, 535.

## HOMICIDE.

1. Law of homicide in Pennsylvania defined. *Commonwealth v. Moore*, 502.
2. Adultery, by the law of Pennsylvania, will not justify homicide. *Ibid.*
3. Insanity in law defined, analyzed, discussed and applied to the question of homicide. *Ibid.*

## HUSBAND AND WIFE.

1. A judgment entered on the note of a married woman for the purchase-money of real estate, will not be stricken off, unless she rescinds the contract and re-conveys the land to the grantor. *Dotro v. Dotro*, 261.
2. Where a husband, with the knowledge, concurrence and approbation of his wife, contracts in his own name for the erection of a dwelling on land belonging to the wife, the lot and building is liable on a mechanic's lien filed for work done and materials furnished by a subcontractor. *Forrester v. Preston*, 298.
3. Frequent visits by the wife to the building during the progress of the work, giving directions concerning the work, and selecting materials for the building, constitute sufficient evidence of her knowledge and approbation of the contract for building. *Ibid.*
4. On a *sci. fa.* on a mechanic's lien, filed against a married woman as owner, it is proper, though not essential, to join the husband as defendant. *Hutchinson v. Preston*, 303.
5. A mere technical omission to join the husband as a defendant is cured by a plea in bar, trial and verdict. *Ibid.*
6. The presumption of coercion which the law raises when the acts complained of are done by the wife in the presence of the husband is *prima facie*. *Woodward v. Root*, 387.
7. Therefore, to maintain an action against them for their joint act, the declaration should itself set forth facts, or contain allegations, negating this presumption. *Ibid.*
8. Where one purchases real estate by articles of agreement made with a husband only, in which is a covenant as for title clear of encumbrance, and the vendor's wife refuses to execute the conveyance, the purchaser may refuse to take the land, and bring his action on the covenant. But if by promise of a consideration he induces the wife to join in the deed he is liable to her therefor. *Magogney v. Reed*, 389.
9. The real estate of a married woman, bought with her separate funds and deed taken in her own name, cannot, under the Act of 1848, be seized and sold for her husband's debts; and a purchaser at such sale takes nothing. *Ross et al. v. Lynch et al.*, 472.
10. Where a married woman's mortgage, voluntarily made and for her own benefit, was defectively acknowledged, but when she and her husband were served with the *scire facias* issued thereon, they did not appear to defend it, and suffered judgment to be entered against themselves, a *levari facias* to issue, a sale to be made, and sheriff's deed delivered without remonstrance, she could not afterwards take advantage of the defect. She is concluded by the judgment on the *scire facias*. *Ibid.*
11. The judgment remaining unreversed cannot be questioned collaterally in another action. *Ibid.*
12. Parties in possession of the real estate, under sheriff's sale for the husband's debts, are not terre tenants, and entitled to a day in court as to the judgment on the *sci. fa.* *Ibid.*

INADEQUACY OF PRICE.—See ORPHANS' COURT SALE, 1, 2, 3.

INDICTMENT.—See CRIMINAL LAW.

#### INFANTS.

1. Where a widow and her minor children render service to another, upon his promise to her to pay her for her own and the children's services, she is entitled to recover for their services, as well as for her own. Her right to recover is based on the privity of contract and the express promise, for which there was a sufficient consideration. *Mantz's Executor v. Stinson's Executor*, 295.
2. A father may maintain an action in admiralty for the wages of his minor children, but it is a right which may be renounced or forfeited. *McGinnis v. The Grand Turk*, 326.
3. He may renounce it by voluntarily allowing his child to have the exclusive use of the fruits of his own industry; or he may forfeit his right by neglecting to perform those duties which are the foundation of that right. *Ibid.*
4. Act of Congress of 13th February, 1862, construed. *Ibid.*
5. The oath of enlistment, where the person enlisted is under eighteen, is not conclusive upon the courts, but is upon the recruiting officer, for whose protection the proviso was inserted in the act. *Turner's Case*, 370.
6. The Act of 1802 declares that no person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent of his parent or guardian or master first had and obtained, if any he have. *Ibid.*
7. The Act of 20th January, 1813, provided that this consent should be first obtained in writing. *Ibid.*
8. And the Act of 10th December, 1814, repealed this section of the Act of 1813, but left intact the Act of 1802, which requires the previous consent, but does not require that it should be in writing. *Ibid.*
9. A contract of enlistment with a minor, being prohibited by the statute, is not merely voidable, but absolutely void. *Ibid.*
10. It does not alter the case that he perpetrated a fraud upon the officer enlisting him, for otherwise it would take away the very protection which the law intends to throw around him, to guard him from the effects of his folly, rashness and misconduct. *Ibid.*
11. The return to the writ of *habeas corpus* does not make the minor a deserter. There can be no criminal desertion, if the enlistment was illegal. *Ibid.*
12. The desertion was a declaration merely of an intention not to be bound; a disclaimer of the contract, which, under the Act of Congress, he had a right to make, in the absence of the consent of his parent or guardian. *Ibid.*
13. In the presence of an enemy or in an enemy's country, the minor, and even camp followers, would be amenable to martial law; for if

INFANTS—*continued.*

- they were not, the safety of the army might be somewhat jeopardied by their desertion to the enemy. *Turner's Case*, 370.
14. It could only be in that light that a person unlawfully enlisted, and held without authority of law, would be amenable to military punishment. *Ibid.*
  15. Under the Acts of Assembly, persons between the ages of eighteen and twenty-one years may claim exemption from military draft, but like all other personal privileges, it must be pleaded or claimed at the proper time and before the proper tribunal, and if not so done it is waived. *Galgallon's Case*, 377.
  16. If a person not liable to militia duty be enrolled as a militiaman, and does not claim exemption of the commissioner of this district, but suffers himself to be mustered into service and remains there for one month before instituting proceedings for his release, his neglect is evidence of a voluntary submission to the draft. *Ibid.*
  17. As decided in *Turner's Case*, *supra*, 370, the enlistment of minors held to be illegal, in the absence of the consent of their parents or guardians. *Henderson's Case*, 440.
  18. A prisoner of war paroled by the enemy, although a minor, is not entitled to his discharge until after his exchange. *Ibid.*
  19. His father's claim to his services must be subordinated to the public exigency, to the higher claims of the nation. *Ibid.*
  20. The parole or promise given by the son, was for his good, for his liberty, and although a minor, it is binding upon him, independent of public or political reasons. *Ibid.*
  21. The government of the United States, from motives of humanity, have been compelled to treat the present rebellion as a public war, and to apply to it the rules of civilized warfare. *Ibid.*
  22. Parols given by prisoners of war are of sacred obligation, and the national faith is pledged for their fulfilment. *Ibid.*
  23. Cartels or military agreements, for the exchange of prisoners, made by the officer in command, are of such force, under the law of nations, that even the sovereign cannot annul them. *Ibid.*
  24. Good faith and humanity ought to preside over the execution of these compacts, which are designed to mitigate the evils of war without defeating its legitimate purposes. *Ibid.*
  25. These cartels have all the binding power of treaties, which, under the 6th article of the Constitution of the United States, are a part of the supreme law of the land. *Ibid.*
  26. When the minor is in an attitude to enable the government to comply with the cartel of their military officer, and the minor has been duly exchanged, the rights of the parent will be properly regarded. *Ibid.*

INFRINGEMENT.—See *PATENT*.

INJUNCTION.—See *EQUITY*.



## INSANITY.

Insanity in law defined, analysed, discussed and applied to the question of homicide. *Commonwealth v. Moore*, 502.

## INSURANCE.

1. Where the provision of a policy of insurance was, that "if any change be made as to the tenants or occupancy of the premises, without being notified to the company, and indorsed upon the policy, then this instrument is to be void." Held, that if the persons who occupied the premises at the time of the execution of the policy, left a short time before the fire, leaving them unoccupied at the time of the fire, it was not necessary that the assured should have given the company notice that the tenant had left, in order to hold the company liable. *McAnnally v. Insurance Company*, 189.
2. Where an insurance is effected upon the interest of the owner of a steamboat, the loss, if any, payable to a mortgage creditor, being intended, as between the owner and mortgagee, as a security for the claim of the latter, of which fact the underwriter is informed when the application for insurance is made, it cannot be regarded as an insurance of the interest of the mortgagee, although intended for his benefit; and where the owner cannot recover on the policy there can be no recovery in his name for the use of the mortgage creditor. *Marsh v. The Citizens' Insurance Company*, 273.
3. In the absence of fraud or wilful misconduct, the loss is to be attributed to the proximate cause, and if occasioned by a peril insured against, is within the policy, although the remote cause may be the negligence of the assured, his servants or agents. The simple fact of negligence in either, however great in degree, is no defence to the underwriter. *Ibid.*
4. Where there is no evidence that turpentine, by means of which the boat was set on fire, was carried without the license required by the Act of Congress, the legal presumption is that the requirements of the law in this respect were complied with. *Ibid.*

## INTESTATE.

1. Where the heirs at law of a decedent are all nephews and nieces, the distribution is *per capita* and not *per stirpes*. *In re Chase's Estate*, 130.
2. Where one died seised of real estate, descended from her father, leaving as her nearest kindred her mother, a paternal aunt and maternal aunts and uncles, the paternal aunt alone is entitled, as next of kin of the blood of the ancestor from whom the estate descended. *Gilmore v. Ross*, 500.

## INVENTION.—See PATENT.

## JUDGMENT.

1. One of three executors, all of them being in full life, cannot, without the knowledge and consent of the other two, who are the acting exe-

JUDGMENT—*continued.*

- cutors, confess a judgment which will bind the estate. *Karl v. Black's Executors*, 19.
2. The validity of a judgment cannot be called in question in a collateral proceeding. *Loneragan v. Fenlon*, 115.
3. A judgment entered on the note of a married woman for the purchase-money of real estate, will not be stricken off, unless she rescinds the contract and reconveys the land to the grantor. *Dotro v. Dotro*, 261.
4. Judgment will not be entered "for want of sufficient affidavit of defence," where the affidavit of claim is not in substantial compliance with the rule of court. *Garrard v. Allegheny County*, 338.

JUDICIAL SALE.—See ORPHANS' COURT SALE, 1, 2, 3.

JURISDICTION.

1. When the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who have an equitable interest in the claim. *Adams v. White*, 21.
2. He who has the legal right may sue at law in the Federal Courts, without reference to the citizenship of those who may have the equitable interest. *Ibid.*
3. Where the only absolute limit of the defendant's liability is the amount of the penalty, and that is over one hundred dollars, the District Court has jurisdiction of the action. *Curtis v. Kearney*, 87.
4. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until the judgment is satisfied. *Pollock v. Lawrence County*, 137.

JUSTICE OF THE PEACE.

1. There is nothing in the statute authorizing a justice of the peace to ascertain the amount of a claim without testimony, unless on the admission of a defendant. The non-appearance of a defendant authorizes a judgment by default, but still the plaintiff must prove his claim. *McCowan v. Ward*, 251.
2. A justice of the peace is not liable in an action for damages for refusing an appeal when the party demanding was entitled to it. *Bogart v. Ink*, 332.
3. The principle of the law seems to be that whenever the law requires the officer to decide upon evidence, whether an act is to be done or not, if he considers the subject, and mistakingly decides wrong, no action can be sustained. *Ibid.*

LANDLORD AND TENANT.—See TAXES.

1. In the absence of any contract on the subject, or stipulation in the lease, the tenant is bound to do all repairs, and keep the premises in tenantable order at his own expense. *Russell v. Rush*, 134.

LANDLORD AND TENANT—*continued.*

2. Where the lease provided that the tenant was to do the inside repairs, but was silent as to the outside, and it was shown that the landlord, after the tenancy began, made some outside repairs, the question whether or not an agreement existed that the landlord should do the outside repairs was held to belong to the jury to determine. If the lease was the only evidence on the subject, it would be for the court to interpret it. *Russell v. Rush*, 134.
3. If a landlord, bound to repair, puts the premises in ordinary good condition and repair, their becoming uninhabitable from other causes constitutes no defence against payment of the rent. *Ibid.*
4. It is the tenant's duty to remove temporary or accidental obstructions from drains, spouts, water pipes and the like, keeping the premises in good order as he received them. *Ibid.*
5. Where a landlord, bound to repair, neglects to do so, and in consequence the premises become untenable, and the tenant suffers damage, the tenant has a right to leave, and may set off the actual and immediate damage he has sustained against the claim for rent. *Ibid.*

## LATERAL RAILROADS.

1. Mandamus is a proper remedy to compel the builder of a lateral railroad to permit others to use his road, under the provisions of 7th section of Act 5th May, 1832; nor is it a reason for excluding a transporter from the use of such road that he may carry his tonnage by some other road, nor that his cars and wagons would be an obstruction to the business of the proprietor. *Commonwealth v. Corey*, 444.
2. The proprietor of a lateral railroad is bound to insert or suffer others to insert the necessary switches, sidings, and connections to get cars on and off the main track, and to permit cars, whether laden or empty, to pass up and down the road, according to the reasonable rules that prevail on other railroads. *Ibid.*
3. Mandamus does not lie, when the relator who seeks to transport his coal over a lateral railroad has not opened or mined his coal or offered it in cars for transportation. If this has been caused by the refusal of the proprietor to pass the relator's empty cars into his mine, such refusal forms the matter of complaint; for he has an undoubted right to such a passage, and if the proprietor does not prescribe reasonable rules for its exercise, the court will prescribe them. *Ibid.*
4. The transporter has no right to use the incline plane, the tippie, or schute, the screens, or the landing of the proprietor of a lateral railroad, as these are his private property. *Ibid.*
5. When such transporter has provided himself with a landing immediately above that of the proprietor of the road, he must approach such landing from the head of the incline plane by means of his own providing. *Ibid.*

LEASE.—See LANDLORD AND TENANT.

LEGAL TENDER.

The Act of Congress of 25th February, 1862, authorizing the issue of legal tender notes of the United States, is constitutional. *Crocker v. Wolford*, 453.

LEGISLATIVE POWER.

The legislature has no authority to barter away its essential attributes of sovereignty; and each legislature should assemble with the same measure of sovereign power which was held by its predecessors. *Citizen's Passenger Railway*, 10.

MALICIOUS BURNING.—See CRIMINAL LAW, 1, 2, 3.

MANDAMUS EXECUTION.—See CITIES; COUNTIES AND TOWNSHIPS; PRACTICE.

MARRIED WOMEN.—See HUSBAND AND WIFE.

MECHANICS' LIEN.

1. Where a husband, with the knowledge, concurrence and approbation of his wife, contracts, in his own name, for the erection of a dwelling on land belonging to the wife, the lot and building is liable on a mechanic's lien filed for work done and materials furnished by a sub-contractor. *Forrester v. Preston*, 298.
2. Frequent visits by the wife to the building during the progress of the work, giving directions concerning the work, and selecting materials for the building, constitute sufficient evidence of her knowledge and approbation of the contract for building. *Ibid.*
3. On a *sci. fa.* on a mechanic's lien, filed against a married woman as owner, it is proper, though not essential, to join the husband as defendant. *Hutchinson v. Preston*, 303.
4. A mere technical omission to join the husband as a defendant is cured by a plea in bar, trial and verdict. *Ibid.*

MINOR.—See INFANT.

MUNICIPAL CORPORATIONS.

1. A limitation on the taxing powers of municipal corporations is not equivalent to a prohibition to contract debts. *Emerson et al. v. Blairsville*, 39.
2. If town councils should be so improvident as to let debts be contracted for town purposes beyond the reach of the means which their taxing power can provide, the courts have no authority to control them, when the law of their existence does not restrain them. *Ibid.*
3. By the 8th section of the Act of 21st April, 1858, (Pamph. L. 387,) municipal corporations are relieved from the necessity in any case of filing an affidavit of defence. *Garrard v. Allegheny County*, 338.

ORPHANS' COURT SALE—*continued*.

2. If such irregularity, misapprehension, or unfair practice is shown, *alunde*, then the inadequacy of price, though slight, will be imputed to that cause, and then if the court is satisfied that the owner of the property or his creditors will be benefited, the sale may be set aside, or the biddings opened and a re-sale ordered. *Ryan's Estate*, 178.
3. A misapprehension in the mind of heirs and administrators, in case of an Orphans' Court sale, regarding the practice of the court as to setting aside sales for inadequacy of price, is such a misapprehension as is contemplated above. *Ibid*.
4. A sale for the payment of debts under the Orphans' Court discharges all liens. *Billmeyer et al. v. Slifer*, 539.
5. Notice given to the buyer of property at an Orphans' Court sale for the payments of debts visits him with a knowledge of all the facts implied in the notice. *Ibid*.

OYER AND TERMINER.—See CRIMINAL LAW.

PARENT AND CHILD.—See INFANT.

## PARTNERSHIP.

1. One partner of a manufacturing firm has not the power without the consent of his copartner to sell out the whole assets of the firm, including the tools of their trade, and thus terminate the partnership; and a court of equity will interfere by injunction to prevent the consummation of such attempted sale. *Sloan v. Moore & Lints*, 44.
2. Upon the dissolution of a partnership, if the firm do not harmonize in their views as to the disposition of the assets, the appointment of a receiver is of course. *Ibid*.
3. One largely indebted, by forming a copartnership and transferring to such copartnership a part or even the whole of his property, provided it was *bonâ fide*, does not thereby hinder, delay or defraud his creditors, under the statute of Elizabeth. Their remedy may be changed, but it is still a full, ample and complete remedy. *Browne v. Ripka & Co.*, 537.
4. An assumption of some of the partners individually of all the debts of a firm, largely indebted, is in law a valuable consideration for the release to them of the interest of another partner. *Ibid*.

## PATENT.

1. A party using contrivances to supplant another in the use of a patent, by obtaining the assigment of the extended term thereof, and by his answer to a bill in chancery and his cross bill under oath, claiming the ownership of the extended patent, and praying injunction from its use against the other party, is to be regarded as admitting both the value of the patent and its originality. *Livingstone v. Jones*, 68.
2. The originality and validity of the Sherwood patent of *Janus* or double-faced door locks, investigated and established. *Ibid*.
3. Where an inventor has made application for a patent, the delay afterwards interposed either by the mistakes of the public officers or the

PATENT—*continued.*

- dilatory proceedings of courts, where gross laches cannot be imputed to the applicant, cannot affect his rights. *Adams v. Jones*, 73.
4. A man may justly be treated as having abandoned his application if it be not prosecuted with reasonable diligence. *Ibid.*
  5. If an inventor claims two distinct improvements in one machine, he may apply for them jointly and have a single patent for them both. If he has made a mistake as to one of the improvements claimed, but is clearly entitled to a patent as to the other, he cannot be justly said to have abandoned either during a litigation as to his right to both. *Ibid.*
  6. Patterson's patent for a concave bevelled keeper, held to be an immaterial variation of Adams' patent for an "improved keeper for right and left hand door locks," worthless as an improvement, and palpably got up as a cover and to give color to an invasion of rights. *Ibid.*
  7. The novelty of the Adams improvement examined and affirmed. *Ibid.*
  8. The Circuit Courts of the United States, having jurisdiction in equity of controversies arising under the United States Patent Laws, do not act as ancillary to a court of law, and, therefore, do not require the patentee first to establish his legal right in a court of law, and by the verdict of a jury. *Sanders v. Logan*, 241.
  9. Where the injury done to a patentee by infringement of his patent is not in the use of his invention, but in making use of it without compensating the patentee therefor, it being the interest of the patentee that his invention should be adopted and used by all, the measure of "actual damage" is the price or value of a license to use it. *Ibid.*
  10. In such cases, the measure of damage being a certain sum, an account of profits is not required, and the jurisdiction of a chancellor need not be invoked. *Ibid.*
  11. Injunction is not the proper remedy in such cases. It is a remedy used only for prevention and protection, and not to enforce the payment of money, nor for extortion. *Ibid.*
  12. A court of law may treble a verdict for "actual damage" in a patent suit, where the defendant has acted wantonly or vexatiously, but a court of equity can inflict no exemplary or punitive damages, as a court of law may. *Ibid.*
  13. The use of several machines in public, for more than two years, prior to applying for a patent, although slightly varying in form and arrangement, yet substantially the same as afterwards patented, cannot be alleged to be experimental, so as to avoid the legal consequences of such prior use. *Ibid.*
  14. The obvious construction of the seventh section of the Patent Act of 1839 is, that a purchase, sale, or prior use, within two years before applying for a patent, shall not invalidate, unless it amounts to an abandonment to the public. *Ibid.*
  15. Abandonment may take place within two years prior to the application for a patent. *Ibid.*

PAUPER.—See POOR.

#### PEWHOLDERS.

1. Pewholders in a church are liable, under the established general rules and regulations of the association, for increased *pro rata* assessments laid by the trustees of the association on the value of the pews, to raise the necessary means of defraying the proper and current expenses of the association, notwithstanding in the deeds originally given to the pewholders for their pews a specified lower rate per cent. was reserved. *Curry v. The Trustees*, 40.
2. The trustees of a religious association may adopt by-laws or resolutions to equalize the amount necessary for its support, and assess the proportionable amount on each pewholder, though there is no provision in the constitution or articles of association authorizing them so to do. *Ibid.*
3. Property in a pew is a mere easement, being confined to the right to sit therein during public worship. *Ibid.*

#### PLEADING.

1. Matters which appertain solely to the jurisdiction of a court, or to the disabilities of a suitor, should never be blended with questions which enter essentially into the subject-matter of the controversy. *Adams v. White*, 21.
2. In dilatory pleas the greatest precision is required. *Ibid.*
3. A plea to the jurisdiction concludes to the cognisance of the court, by praying judgment, if the court will take cognisance of the suit, or of the plea (declaration) aforesaid. *Ibid.*
4. Plea to the jurisdiction must be signed by the defendant in person, and not by attorney. *Ibid.*
5. The affidavit accompanying the plea must be positive, and not "as he believes." *Ibid.*
6. The plea must be put in within four days of the term to which the declaration is filed, counting both days inclusive. *Ibid.*
7. Filing plea in bar is a waiver of the plea in abatement. *Ibid.*
8. A literal copy of the note, omitting the endorsement, which is averred in the declaration, is a compliance with the 71st rule of the United States District Court. *Ibid.*
9. In his affidavit of defence, the defendant must state "fully and particularly" the nature and amount of his set-off. *Ibid.*
10. Where an attachment is served on a garnishee, before suit brought on the claim attached, he is bound to plead it in abatement, and cannot give it in evidence under the plea of payment with leave, &c. Having pleaded payment in bar, he will be precluded on trial from pleading in abatement. *Adams v. Avery's Executors*, 77.
11. Where defendant contracted to give plaintiff a railroad truck and a horse, in exchange for a patent right assigned by plaintiff, but failed,

PLEADING—*continued*.

- from want of title, to deliver the truck, the plaintiff cannot recover under a count for money had and received. *Pratt v. Trunick*, 289.
12. The plaintiff should file a special count, averring the exchange agreed on, the failure of title to the truck, its value and notice to defendant. *Ibid*.
13. In order that property given and received as money may be recovered as money, the agreement to treat it as such must be clear. *Ibid*.
14. The presumption of coercion, which the law raises when the acts complained of are done by the wife in the presence of the husband, is *prima facie*. *Woodward v. Root*, 387.
15. Therefore, to maintain an action against them for their joint act, the declaration should itself set forth facts, or contain allegations, negating this presumption. *Ibid*.

## POOR.

1. The primary duty imposed by the general poor laws, upon the overseers of the poor, in emergencies arising from disease or sudden infirmity, is to furnish relief, next to obtain an order of maintenance, and then afterwards, if practicable, an order of removal. In such cases relief may precede any order for that purpose, and the proper district would be liable to pay therefore without such order. *Directors of the Poor v. Davis*, 36.
2. The provisions of the special poor law, enacted for Allegheny county, viz: Act of 23d April, 1852, and supplement of 18th April, 1855, are in plain affirmance of the humane purpose of all previous laws on the subject, and were not intended to effect any change in the principles of the original design, but merely in the executive machinery, or details, by transferring the duties and liabilities of the overseers under the prior law, to the directors under the latter one. *Ibid*.

## POSTMASTER.

1. Where a postmaster has made default in not paying the quarterly balances found to be due to the United States, by the auditor for the Post Office Department, and the Postmaster-General has failed to institute suit against such postmaster and his securites for two years from and after such default, the securities are discharged. *Roddy v. United States*, 374.
2. Proviso to 3d section of the Act of Congress of the 3d March, 1825, construed. *Ibid*.

## PRACTICE.

1. Where an Act of Assembly grants the right of appeal and a hearing, in the case of a report by viewers appointed by the Quarter Sessions, estimating benefits, and apportioning and assessing damages occasioned by the opening of a public street, it is to be construed as meaning an



## PRACTICE—continued.

- appeal to the court and for hearing before the court. The case is not of that class contemplated by the clause of the Constitution in which the right of trial by jury is secured. *Extension of Pennsylvania Avenue*, 1.
2. If the street be laid out by force of the Act of Assembly alone, and the act be for a public purpose, all persons interested are bound to take notice of its provisions. *Ibid.*
  3. Where the act prescribes that the viewers appointed by the court shall "proceed with as little delay as possible to view and examine the ground proposed for the extension of said avenue;" and after apportioning damages, &c., "shall file the said apportionment and assessment in the said court," it is not an essential requisite in all such cases that the report should be filed at the next term of the court. *Ibid.*
  4. The presumption of law is in favor of the correctness of the viewers' report. *Ibid.*
  5. If the street be laid out and extended, not by virtue of the city's corporate powers, but by direct legislation, and the act authorizes the viewers to apportion and assess the damages upon and among the individuals benefited fairly and equitably, the viewers are not confined in the apportionment, &c., to property within the city limits. *Ibid.*
  6. Where on trial, the plaintiff at bar amends his declaration in matter of substance, to which defendant, alleging surprise, refuses to plead or demur, but moves for a continuance, it is the duty of the court to grant the motion. *Pittsburgh and Steubenville Railroad Co. v. Clark*, 48.
  7. An action on the case will lie against an officer who disregards the provisions of the Act of April 9th, 1849, by selling personal property required by the defendant in the execution to be appraised and set off to him. *Vandresor v. King*, 56.
  8. Formation of issue, in cases of appeal where lands or materials are taken for railroads or other roads, discussed, and directions given therefor. *Pittsburgh and Conneville Railroad Co. v. Watson*, 82.
  9. To maintain a *scire facias quare executionem non*, sur judgment confessed on a replevin bond with warrant of attorney annexed, it is not necessary that a *sci. fa.* suggesting breaches of the condition of the bond should have been issued, or an allegation, that there is a judgment *de retorno habendo* in the replevin suit, made in the *sci. fa.* issued or entered on the record of the judgment confessed on the replevin bond. *Curtis v. Kearney*, 87.
  10. That a rule to show cause why judgment of *non pros.* in the action of replevin should not be opened, and in the meantime proceedings stayed, obtained since the issuing of the *sci. fa.* and still pending, is no barrier where plaintiffs in the replevin have not used due diligence, to the proceedings on the *sci. fa.* *Ibid.*
  11. Where the only absolute limit of the defendant's liability is the amount of the penalty, and that is over one hundred dollars, the District Court has jurisdiction of the action. *Ibid.*
  12. The remedy for enforcing judgments against counties and townships,

PRACTICE—*continued.*

provided by the Act of 15th April, 1834, is not applicable to cities. *Oelrichs v. Pittsburgh*, 93.

13. The Act of 1819, directing the levy and sale of stocks in bodies corporate, held by bodies politic, is not repealed by the Act of 1836; and the opinion of the Supreme Court of Pennsylvania in *Lex v. Potters*, 4 Harris 295, concurred in. *Ibid.*
14. State laws cannot control the exercise of the powers of the National government, or, in any manner, limit, or affect the operation of the process, or proceedings of the national courts. *Ibid.*
15. The whole efficacy of such laws in the courts of the United States, depends upon the enactments of Congress. So far as they are adopted by Congress they are obligatory. Beyond this they have no controlling influence. *Ibid.*
16. Congress may adopt such state laws directly by substantive enactment, or they may confide the authority to adopt them to the courts of the United States. *Ibid.*
17. The Act of Congress of the 19th of May, 1823, adopted the process of the state courts then in use. Any changes by future state legislation, to be adopted only, by rule of court, at the discretion of the judges of the courts of the United States. *Ibid.*
18. At the date of the passage of the Act of Congress, of the 19th May, 1828, the law of Pennsylvania, of 1819, was in full force. *Ibid.*
19. It authorized the stock of any body corporate, owned by bodies politic, like the city of Pittsburgh, to be taken in execution under a *fi. fa.*, and sold in the same manner as goods and chattels. *Ibid.*
20. The levy by *fi. fa.*, on the stock of the defendants in the Pittsburgh Gas Company held to be legal and proper. *Ibid.*
21. The plaintiff in an action on a replevin bond, where there was judgment of nonsuit in the action of replevin, may either issue a *scire facias quare executionem non* or a *sci. fa.* suggesting breaches. *Magill, for use, v. Higgins et. al.*, 107.
22. But he is not at liberty to suggest breaches and forthwith issue an execution for the penalty of the judgment, to be released on payment of the value of the property replevied, with interest and costs. *Ibid.*
23. The defendants are entitled to a day in court, and besides, the sureties are not concluded by the value fixed on the property in the replevin bond. *Ibid.*
24. The issue of a special *fi. fa.* under the Act of 1834, and which has been executed and returned by the marshal, does not conclude the plaintiff, but he may resort to his common law writ of *fi. fa.* to obtain satisfaction of his judgment. *Dobbin v. Allegheny County*, 120.
25. He may have several writs in succession; or suing out one, he may abandon it before it is executed, and sue out another; or he may even have several writs running at the same time, provided they all be of the same species. *Ibid.*

## PRACTICE—continued.

26. The taking out of the writ is not an election, but only in order to an election. *Dobbin v. Allegheny County*, 120.
27. An attachment execution, under the Act of 1836, is in substance, if not in form, an execution, and such writ may issue pending a *fi. fa.* *Ibid.*
28. The remedies of a plaintiff are cumulative and successive, and the pursuit of one remedy will not deprive him of another. *Ibid.*
29. The courts of the United States may, in their discretion, adopt any part, or all of the remedies provided by the legislature of a state. *Ibid.*
30. This delegation of power by Congress, held to be constitutional, by the Supreme Court of the United States. *Ibid.*
31. The adoption of the Act of Assembly of Pennsylvania, of 1834, as part only of the final process of the United States Circuit Court, to enforce judgments against counties, held to be within the limits of their legitimate and constitutional powers. *Ibid.*
32. An answer should be a counter statement of facts, a confutation of what is alleged by the other party, and should be neither evasive nor argumentative. *Pollock v. Lawrence County*, 137.
33. The annual estimate of the probable expenses of the county for the ensuing year, required by law to be made by the commissioners, is not an appropriation. *Ibid.*
34. An appropriation is to set apart or vote a sum of money for a particular object. *Ibid.*
35. There is no appropriation of any part of the common fund, until the commissioners, by their warrant on the treasurer, indicate the specific object to which it is to be applied or set apart. It is then severed from the mass and "appropriated," and not before. *Ibid.*
36. When unfortunately the current expenses exceed the current income, and all cannot be promptly paid, to the vigilant must be given the first products of the treasury. *Ibid.*
37. No capricious application of the public funds by the commissioners, in the face of a debt solemnly adjudicated, and after notice of an execution commanding its payment, will be permitted. *Ibid.*
38. The execution provided by the Act of 1834, relative to counties, operates as an injunction upon the commissioners, restraining them from drawing any warrant, or making any payment for any purpose whatever, until the judgment is satisfied. *Ibid.*
39. The jurisdiction of a court is not exhausted, by the rendition of its judgment, but continues until the judgment shall be satisfied. *Ibid.*
40. The writ authorized by the Act of 1834 is not the prerogative writ of mandamus, for that can issue without a judgment, but this cannot. *Ibid.*
41. Neither is it an original proceeding against the commissioners, but an execution and final process to enforce the payment of a judgment. *Ibid.*

PRACTICE—*continued*.

42. There can be no just ground of complaint, when the courts of the United States adopt the process of the courts of the state. *Pollock v. Lawrence County*, 137.
43. A refusal to obey the command of the execution, will be followed by an attachment against the commissioners. *Ibid*.
44. There is nothing in the statute authorizing a justice of the peace to ascertain the amount of a claim without testimony, unless on the admission of a defendant. The non-appearance of a defendant authorizes a judgment by default, but still the plaintiff must prove his claim. *McCowan v. Ward*, 251.
45. Inadequacy of price merely, in a judicial sale of any kind, is not sufficient of itself to justify the court in withholding its sanction and approval, unless that inadequacy is so gross as of itself to amount to proof of some latent irregularity, misapprehension or unfair practice. *Ryan's Estate*, 178.
46. If such irregularity, misapprehension or unfair practice is shown, *aliunde*, then the inadequacy of price, though slight, will be imputed to that cause, and then if the court is satisfied that the owner of the property or his creditors will be benefited, the sale may be set aside, or the biddings opened and a re-sale ordered. *Ibid*.
47. A misapprehension in the mind of heirs and administrators, in case of an Orphans' Court sale, regarding the practice of the court as to setting aside sales for inadequacy of price, is such a misapprehension as is contemplated above. *Ibid*.
48. Where defendant by his testimony in chief puts his defence solely upon the ground of payment, and plaintiff merely replies by disproving it, it is too late then to set up a new, independent defence under cover of a rebuttal of the plaintiff's reply. *Mershon v. Hood & Co.*, 207.
49. Judgment will not be entered "for want of sufficient affidavit of defence," where the affidavit of claim is not in substantial compliance with the rule of court. *Garrard v. Allegheny County*, 338.
50. Writs of execution of the United States Circuit Court for the Western District of Pennsylvania, against a county, issued under a rule of that court, adopting as a part of its civil process, the 6th and 7th sections of an Act of Assembly, relative to actions by and against counties and townships, approved April 15, 1834, have just the same force and effect as similar writs issued by the state courts. *Commonwealth v. Floyd*, 342.
51. The courts of the United States receive the statutes and judicial precedents of the different states as evidence of the law of each state without special plea or proofs of witnesses. *Evans v. The Cleveland and Pittsburgh Railroad Co.*, 483.

PRINCIPAL AND AGENT.—See AGENT.

## PRIVILEGE.

1. A stockholder or attorney of a corporation of another state, while here attending to, or preparing for, legal proceedings, to which the corporation is party, in the United States Courts, and in coming and returning, is protected from all other civil process—the same as if he were individually party to the suit, and resident in this state, and the proceedings upon which he attended were in the state courts. *Holmes v. Nelson*, 216.
2. Liberality of the constitutional privileges granted the citizens of each state in the several states. *Ibid.*

## PURCHASE-MONEY.

A judgment entered on the note of a married woman for the purchase-money of real estate, will not be stricken off, unless she rescinds the contract and re-conveys the land to the grantor. *Dotro v. Dotro*, 261.

## QUARTER SESSIONS.—See CRIMINAL LAW.

## RAILROAD BONDS.—See GUARANTY.

## RAILROAD DAMAGES.

Formation of issue for assessment of damages in cases of appeal, where lands or materials are taken for railroads or other roads, discussed, and directions given therefor. *Pittsburgh and Connelsville Railroad Company v. Watson*, 82.

## RAILROADS.

1. By the Act of Assembly of April 18, 1853, (Pamph. L. 473,) and its supplement of April 11, 1862, (Pamph. L. 436,) authority is given to the Cleveland and Pittsburgh Railroad Company to build a railroad from Rochester to Pittsburgh. *Petition of C. & P. Railroad Company*, 348.
2. Though the language of the 11th section of the Act of Assembly of 19th February, 1849, regulating railroad companies, is mandatory that the court shall appoint a view, it means that they shall appoint a view only when the petitioner brings his case within the act. *Ibid.*
3. The legislature has no power to authorize one railroad company to appropriate any premises of another railroad company which are necessary to the proper conduct of the business of the latter. *Ibid.*
4. If a railroad company own lands or rights of way not necessary for the proper conduct of its business, such property may be taken for the use of another company, just as the property of any one on the line of the proposed road. *Ibid.*

## RAILROAD SUBSCRIPTIONS.

1. The Act of Assembly of 9th July, 1853, section 7, authorizing certain counties to subscribe to the capital stock of the Northwestern Railway Company, which provides that the counties may "make payments

RAILROAD SUBSCRIPTIONS.—*continued*

on such terms and in such manner as may be agreed upon by said company and the proper county," confers, by such provision, full authority upon the county to issue coupon bonds in payment of such subscription. *Adams v. Lawrence County*, 80.

2. All doubts as to this being the proper construction of the said section are dispelled by the following considerations :

- 1st. Because the legislature themselves have so construed it, the proviso to the said section being "that whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by said railroad company at less than par value," &c., which shows that the legislature took it for granted that the issue of bonds was intended to be included in the brief but comprehensive expression of the "manner in which payment may be made."

- 2d. All parties concerned have treated this as the true construction, and have acted under it accordingly.

- 3d. The matter has been before the Supreme Court of the state : 8 Casey 144, and it does not there appear that the county ought to have the bonds enjoined as made without authority. The decree there is based on the doctrine that these bonds are binding on the county in the hands of *bona fide* holders. *Ibid*.

3. The said bonds, so issued, in the hands of *bona fide* holders, who have obtained them at their market value, are not affected by the proviso of the act, "that whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by said railroad company at less than par value." *Ibid*.

4. The officiating as a judge of an election of an incorporated company, is a waiver of any alleged condition attached to the subscription for its stock, and renders such subscription absolute. *Pittsburgh and Steubenville Railroad Company v. Proudfit*, 85.

RAPE.—See CRIMINAL LAW, 8, 18.

## REAL ESTATE.

Where one died seised of real estate descended from her father, leaving as her nearest kindred her mother, a paternal aunt and maternal aunts and uncles, the paternal aunt alone is entitled, as next of kin of the blood of the ancestor from whom the estate descended. *Gilmore v. Ross*, 500.

## RECEIVER.

1. Upon the dissolution of a partnership, if the firm do not harmonize in their views as to the disposition of the assets, the appointment of a receiver is of course. *Sloan v. Moore & Lints*, 44.
2. Property in the hands of a receiver, appointed by a court of chancery, is not liable to seizure and sale under execution on a judgment at law. *Robinson v. The O. & P. Railroad Company*, 257.

## RECOGNISANCE.

1. The Supreme Court has no authority to review the order or decree of the Common Pleas in the distribution of money collected on a forfeited recognisance in the Quarter Sessions. *Bank of Lawrence County v. Lawrence County*, 81.
2. Act of Congress of 28th February, 1839, authorizing the courts of the United States to relieve bail in certain cases, construed. *United States v. Duncan*, 328.
3. The courts in England had such power, independent of Acts of Parliament conferring it, which were held by the judges to be, simply, in affirmance of the common law. *Ibid.*
4. The reasoning of Chief Justice Marshall, in 1 Brockenbrough 255, although delivered many years before the passage of the Act of Congress, sustains the power of the Court to grant relief, as well after as before judgment. *Ibid.*
5. A recognisance is a matter of record, and when forfeited, it is in the nature of a judgment of record, and when judgment is given, the whole to be taken as one record. *Ibid.*
6. In the courts of the United States, the recognisance is estreated and sued in the same forum, and the court having power over the proceedings from the beginning, may grant relief, even after judgment and execution in the hands of the marshal. *Ibid.*

## RECORDING.—See ASSIGNMENT.

## REGISTER'S COURT.

1. Where a petition to the Register's Court to prove the contents and make probate of an alleged lost will, was dismissed, and the administrator previously appointed, made distribution of the personalty, and the heirs at law, by proceedings in the Orphans' Court, made partition of the real estate, and subsequently the alleged will was found; upon application made for its probate the only question for the Register's Court is the due execution of the paper produced, and its continued existence to the time of his death, as the last will and testament of the decedent. If the proofs are conclusive in the affirmative, probate will be granted, as of course. *Chamber's Estate*, 143.
2. The administrator in such case is protected in the administration by Act of 24th February, 1834, section 68. *Ibid.*
3. Our Acts of Assembly prescribe no time within which a will must be probated. *Ibid.*

## RELIGIOUS ASSOCIATIONS.—See PEWOLDERS.

1. Pewholders in a church are liable, under the established general rules and regulations of the association, for increased *pro rata* assessments laid by the trustees of the association, on the value of the pews, to raise the necessary means of defraying the proper and current expenses of the association, notwithstanding in the deeds originally given to the

RELIGIOUS ASSOCIATIONS.—*continued.*

- pewholders for their pews a specified lower rate per cent. was reserved. *Curry v. The Trustees*, 40.
2. The trustees of a religious association may adopt by-laws or resolutions to equalize the amount necessary for its support, and assess the proportionable amount on each pewholder, though there is no provision in the constitution or articles of association authorizing them so to do. *Ibid.*
  3. Property in a pew is a mere easement, being confined to the right to sit therein during public worship. *Ibid.*
  4. Where a writing conveying the title in trust for a religious society, is silent as to the nature of the worship intended, it will be implied from the denominational connection and the usage of the congregation at the time of the grant and afterwards. *McGinnis v. Watson*, 220.
  5. Such a trust, for a congregation of Seceders, subordinate to the Associate Synod of North America, is for the congregation, and not for the Associate Church at large. *Ibid.*
  6. A trust is a civil right, which must be administered according to the intent of the parties to it, and cannot be affected by an act of ecclesiastical government, changing the church relation which was intended to be advanced by the trust. *Ibid.*
  7. It was incompetent for the Synod of the Associate Church, by an ecclesiastical union with the Associate Reformed Synod merging the name, separate existence and history, and the peculiar standards of the former in a new body called the United Presbyterian Church, and changing the church relations of the members, to carry the rights of property of the congregation into the new church. *Ibid.*
  8. The fragment of the Associate Church, which in 1782, refused to go into the union between the Associate and the Reformed Presbyteries, protested and continued its relation to the Associate Synod of Edinburgh, is that which was known as the Associate Church in 1803, when this trust arose, and down to the union with the Associate Reform Church in 1858. This secession church stood in an attitude of repugnance to the Reformed Presbytery, one of the elements of the union of 1782, and to the Associate Reformed Church after that union, as shown in its narrative and other acts. *Ibid.*
  9. By the adoption of the "basis" of union in 1858, between this secession church, and the Associate Reformed Church, the former became merged in the United Presbyterian; losing its distinctive name, existence and identity of origin and history, its peculiar and distinctive standards and acts of church government, and the means of enforcing its own rigid practice and its peculiar interpretation of the common Presbyterian standards; all of which lying at the foundation of this trust, the members of this congregation were not bound to follow the ecclesiastical body into the union; and the title remains with that portion of the congregation even though a minority, who stand still, and continue in the old church relation. *Ibid.*



REPAIRS.—See LANDLORD AND TENANT.

REPLEVIN.

1. To maintain a *scire facias quare executionem non*, *sur* judgment confessed on a replevin bond with warrant of attorney annexed, it is not necessary that a *sci. fa.*, suggesting breaches of the condition of the bond, should have been issued, or an allegation that there is a judgment *de retorno habendo* in the replevin suit, made in the *sci. fa.* issued, or entered on the record of the judgment confessed on the replevin bond. *Curtis v. Kearney*, 87.
2. That a rule to show cause why judgment of *non pros.* in the action of replevin should not be opened, and in the meantime proceedings stayed, obtained since the issuing of the *sci. fa.*, is still pending, is no barrier, where plaintiffs in the replevin have not used due diligence, to the proceedings on the *sci. fa.* *Ibid.*
3. Where the only absolute limit of the defendant's liability is the amount of the penalty, and if that is over one hundred dollars, the District Court has jurisdiction of the action. *Ibid.*
4. The plaintiff in an action on a replevin bond, where there was judgment of nonsuit in the action of replevin, may either issue a *scire facias quare executionem non* or a *sci. fa.*, suggesting breaches. *Magill, for use, v. Higgins et al.*, 107.
5. But he is not at liberty to suggest breaches, and forthwith issue an execution for the penalty of the judgment, to be released on payment of the value of the property replevied, with interest and costs. *Ibid.*
6. The defendants are entitled to a day in court, and besides, the sureties are not concluded by the value fixed on the property in the replevin. *Ibid.*

RETURN.

A sheriff's return to a writ, as between the parties to an action, is conclusive, and parol testimony to contradict or control it is inadmissible. *Hill & Curry v. Robertson*, 103.

REVIEW.—See BILL OF REVIEW.

ROADS.

1. Road viewers should apply to every owner of land on the designated route for a release, and if it is refused, should consider the damages and advantages likely to result to him from the opening of the road, and if the former predominate, should assess the excess of damages and make report thereof. *Road in Plum Township*, 184.
2. If the owner refuses to release, the viewers cannot refuse to hear his proofs and allegations, and to consider his claim for damages, if he makes any; but if heard or without being heard his claim is considered and decided adversely, his remedy is not by exception to the report or by testimony in court, but by application for a review. *Ibid.*

ROADS.—*continued.*

3. If by a mistake of duty or by oversight the viewers should neglect to apply for a release, or should refuse to hear or consider, or should overlook a claim for damages, and this be made to appear by affidavit or otherwise to the court, the mistake may be rectified by referring the report back to the same viewers for correction. *Road in Plum Township*, 184.
4. It is not requisite that each application for a release or decision against a claim for damages be made to appear on the face of the report or in the releases or otherwise. The viewers are only required to return such releases as they obtain and to report such damages as they assess. As to the rest it is presumed they did their duty in the premises, and the burden of showing the contrary devolves upon exceptants. *Ibid.*
5. Where neither the report or draft shows the improvements on the land, or the fact, where it exists, that there are no improvements, and exceptions thereto are taken, the court will refer the report back to the same viewers to consider and report upon the matter suggested by the exceptions. *Ibid.*
6. A remonstrance can have no weight with the court except where the reports of viewers and reviewers or re-reviewers conflict and leave the duty of the court uncertain. *Ibid.*

SCIRE FACIAS, Q. E. N.—See *REPLEVIN*, 1.

SHERIEF.—See *RETURN*.

## SHERIFF'S SALE.

1. The true construction of the Act of Assembly regulating sheriff's sales of real estate, requires notice to be given in two newspapers for three full weeks, or twenty-one days, previous to the sale. *Wallace's Estate*, 145.
2. When the sheriff is selling property by parcels, whenever he has sold enough to pay the debt, interest and costs of his writ or writs, he ought not to sell any more. *Ibid.*
3. In sheriff's sales the law requires a description of the buildings whenever they are of any appreciable value, or would induce purchasers to bid more—but not otherwise. *Ibid.*
4. Where the levy embraces lots, sold by the debtor, on some of which the purchase-money was fully paid, and on others but partly, the sheriff should first sell those on which a balance remains unpaid, before proceeding to sell those fully paid for. *Ibid.*
5. The real estate of a married woman, bought with her separate funds and deeds taken in her own name, cannot, under the Act of 1848, be seized and sold for her husband's debts, and a purchaser at such sale takes nothing. *Ross et al. v. Lynch et al.*, 472.
6. Where a married woman's mortgage, voluntarily made and for her

SHERIFF'S SALE—*continued*.

own benefit, was defectively acknowledged, but when she and her husband were served with a *scire facias* issued thereon, they did not appear to defend it, and suffered judgment to be entered against themselves, a *levari facias* to issue, a sale to be made and a sheriff's deed delivered without remonstrance, she could not afterwards take advantage of the defect. She is concluded by the judgment on the *scire facias*. *Ross et al. v. Lynch et al.*, 472.

7. The judgment remaining unreversed, cannot be questioned collaterally in another action. *Ibid*.
8. Parties in possession of the real estate, under sheriff's sale for the husband's debts, are not terre tenants and entitled to a day in court as to the judgment on the *sci. fa.* *Ibid*.

## SLANDER.

1. In an action of slander for maliciously charging the plaintiff, a practicing physician, with being a quack, and having killed the defendant's child—evidence, offered to enhance damages, that the rumor prevailed, extensively, in the neighborhood, that defendant had so spoken of plaintiff, is inadmissible. *Miller v. Varnor*, 149.
2. One cannot be responsible for the repetition by others of a slander uttered by him. *Ibid*.
3. *Chapman v. Calder*, 2 Harris 365, is so defectively reported as to be no authority on this point. *Ibid*.
4. To support an action for words spoken in another state, not actionable at common law, it must be shown that they are actionable by the statutes of the state where spoken. *Hill v. Boswell*, 336.
5. The stealing of a promissory note is not a criminal offence at common law, and therefore unless made so by the statute law of Missouri, words spoken in that state charging such stealing, would not be actionable in Pennsylvania. *Ibid*.
6. The declaration in slander must contain a colloquium or averment of the essential facts; a statement of them merely by innuendo would be fatally defective. *Ibid*.

## STAMP ACT.

1. The duty imposed by the United States Stamp Laws on instruments of writing may be paid either by the maker or the party for whose use or benefit they are made. *Voight & Co. v. McKain*, 522.
2. And when an adhesive stamp is used for denoting said duty, it may be affixed and cancelled by the maker, or the party for whose use or benefit the instrument is made, but the stamp must be so affixed and cancelled at the time the paper is issued, otherwise the same will be deemed invalid and of no effect. *Ibid*.
3. As between an indorsee for value and the maker of a promissory note, to which the proper stamp was affixed and cancelled by the payee when he issued or passed the note to the endorsee, the delivery of the note

STAMP ACT—*continued.*

- by the maker to the payee does not constitute an issuing of it within the meaning of the stamp laws, unless there be proof of its then actual issue. *Voight & Co. v. McKain*, 522.
4. Therefore the endorsee is entitled to recover against the maker, on a note so delivered, stamped and issued, in the absence of proof of its actual issue by the maker. *Ibid.*

## STREETS.

1. The power of the legislature to lay out a public street cannot be questioned, as it is a proper exercise of the right of eminent domain for the public good. *Extension of Pennsylvania Avenue*, 1.
2. Where an Act of Assembly grants the right of appeal and a hearing, in the case of a report by viewers appointed by the Quarter Sessions, estimating benefits, and apportioning and assessing damages, occasioned by the opening of a public street, it is to be construed as meaning an appeal to the court and for hearing before the court. The case is not of that class contemplated by the Constitution in which the right of trial by jury is secured. *Ibid.*
3. If the street be laid out by force of the Act of Assembly alone, and the act be for a public purpose, all persons interested are bound to take notice of its provisions. *Ibid.*
4. Where the act prescribes that the viewers appointed by the court shall "proceed with as little delay as possible to view and examine the ground proposed for the extension of said avenue;" and after apportioning damages, &c., "shall file the said apportionment and assessment in the said court," it is not an essential requisite in all such cases that the report should be filed at the next term of the court. *Ibid.*
5. The presumption of law is in favor of the correctness of the viewers' report. *Ibid.*
6. If the street be laid out and extended, not by virtue of the city's corporate powers, but by direct legislation, and the act authorizes the viewers to apportion and assess the damages upon and among the individuals benefited, fairly and equitably, the viewers are not confined in the apportionment, &c., to property within the city limits. *Ibid.*

## SUPREME COURT.

The Supreme Court has no authority to review the order or decree of the Common Pleas in the distribution of money collected on a forfeited recognisance in the Quarter Sessions. *Bank of Lawrence County v. Lawrence County*, 81.

## SURETIES.

1. Where a postmaster has made default in not paying the quarterly balances, found to be due to the United States by the auditor for the Post Office Department, and the Postmaster-General has failed to

**SURETIES—continued.**

- institute suit against such postmaster and his sureties for two years from and after such default, the sureties are discharged. *Roddy v. United States*, 374.
2. Proviso to 3d section of the Act of Congress of the 3d March, 1825, construed. *Ibid.*

**SURPRISE.—See CONTINUANCE, 1.****TAXATION.**

1. A limitation on the taxing powers of municipal corporations is not equivalent to a prohibition to contract debts. *Emerson et al. v. Blairsville*, 39.
2. If town councils should be so improvident as to let debts be contracted for town purposes beyond the reach of the means which their taxing power can provide, the courts have no authority to control them, when the law of their existence does not restrain them. *Ibid.*

**TAXES.**

1. A purchaser at sheriff's sale is bound only for the taxes assessed on the land after the title became vested in him. *Russell v. Schenley*, 356.
2. The owner is personally liable for all assessments on seated lands, and this whether the tax be assessed in his name or in that of the tenant. *Ibid.*
3. Where, by the terms of the lease, the tenants are bound to pay the taxes, and the same are assessed on them, they are to be regarded as the principal debtors, while the landlord is to be considered as a mere surety, entitled to all the rights and remedies of a surety against the principal debtors. *Ibid.*
4. In such case, where the collector had it in his power to have secured the taxes by complying with the request of a tenant, to distrain, on the premises, the goods of a sub-tenant owing rent, and neglected to do so, he must bear the consequence of his own negligence. For the loss occasioned thereby, he cannot recover from the landlord. *Ibid.*
5. The 1st section of the Act of Assembly of 16th May, 1861, taxing the business of brokers and private bankers, imposes the three per cent. tax, not upon their gross receipts, but only upon the net profits of their business. *Commonwealth v. Heiser*, 545.

**TENANT —See LANDLORD AND TENANT.****TOWNSHIP.—See COUNTIES AND TOWNSHIPS.****TROVER.**

1. Where a lessee, under his authority to bore salt wells, brings oil to the surface, the oil belongs to the owner of the soil. *Peterson v. Keir*, 191.
2. The lessee is not bound to collect and keep the oil for the owner; he

TROVER—*continued*.

- may let it run to waste; but if he does collect it and appropriate it for his own benefit, he is liable therefor, and trover will lie to recover its value. *Peterson v. Kier*, 191.
3. Plaintiff, the housekeeper of defendant's testator, after testator's death, delivered to defendant a box, containing a sum of money. She subsequently claimed the money as hers, by virtue of a gift from testator, and after demand and refusal, brought trover and conversion therefor against the executor: Held, that, under the circumstances, clear and satisfactory proof of the gift, and of delivery in pursuance of it, is requisite. *Cummings' Executor v. Meaks*, 490.
  4. A demand upon, and refusal by, an executor to deliver up a specific article, which came to his hands lawfully, will not sustain an action of trover against him as executor. *Ibid*.

## TRUST.

1. In ejectment based upon an alleged trust, depending on no written evidence, but sought to be made out from the acts and declaration of the parties, through a series of years and down to the death of the alleged trustee in possession, the question of the trust is one peculiarly for the jury. *Achmutz v. Achmutz*, 58.
2. In such case, if, on a review of the parol evidence, the court should pronounce it insufficient to divest a paper title, thereby ruling the case against the defendant, without the aid of the jury, the Supreme Court would be obliged, on writ of error, to re-examine the evidence minutely. *Ibid*.
3. Where juries overthrow paper titles in behalf of those resting in parol the Supreme Court will sometime look into the proofs on which they proceeded; but where a party is unable to persuade a jury that he has a parol title, he will find no relief in a writ of error. *Ibid*.
4. Where a writing, conveying the title in trust for a religious society, is silent as to the nature of the worship intended; it will be implied from the denominational connection, and the usage of the congregation at the time of the grant and afterwards. *McGinnis v. Watson*, 220.
5. Such a trust, for a congregation of seceders, subordinate to the Associate Synod of North America, is for the congregation, and not for the associate church at large. *Ibid*.
6. A trust is a civil right, which must be administered according to the intent of the parties to it, and cannot be affected by an act of ecclesiastical government, changing the church relation which was intended to be advanced by the trust. *Ibid*.
7. It was incompetent for the Synod of the Associate Church, by an ecclesiastical union with the Associate Reformed Synod, merging the name, separate existence and history, and the peculiar standards of the former in a new body called the United Presbyterian Church, and changing the church relations of the members, to carry the rights of property of the congregation into the new church. *Ibid*.

TRUST—*continued*.

8. The fragments of the Associate Church, which in 1782, refused to go into the union between the Associate and the Reformed Presbyteries, protested and continued its relation to the Associate Synod of Edinburgh, is that which was known as the Associate Church in 1803, when this trust arose, and down to the union with the Associate Reformed Church in 1858. This secession church stood in an attitude of repugnance to the Reformed Presbytery, one of the elements of the union of 1782, and to the Associate Reformed Church after that union, as shown in its narrative and other acts. *McGinnis v. Watson*, 220.
9. By the adoption of the "basis" of union in 1858, between this secession church, and the Associate Reformed Church, the former became merged in the United Presbyterian; losing its distinctive name, existence, and identity of origin and history, its peculiar and distinctive standards and acts of church government, and the means of enforcing its own rigid practice, and its peculiar interpretation of the common Presbyterian standards; all of which lying at the foundation of this trust, the members of this congregation were not bound to follow the ecclesiastical body into the union; and the title remains with that portion of the congregation, even though a minority, who stand still, and continue in the older church relation. *Ibid*.
10. When a conveyance of land was made to one of three partners who gave a judgment against himself for the purchase-money, the said land, though not so expressed intended, having been purchased for the partnership, and conveyance were afterwards made in succession, by sheriff's sale of the interest of last two partners, to one party, and by Orphans' Court sale of the whole of the land after death of first partner to another party, notice of the sale to the first having been given to the last purchaser. Held, that the last purchaser took the property subject to the trust which existed in favor of the purchaser at sheriff's sale. *Billmeyer et al. v. Skifer*, 539.
11. A partner who purchases property but takes the deed in his own name and gives a judgment against himself in payment, holds the portion of the other partners, in trust, for them, to be executed when they shall pay their share of the purchase-money. *Ibid*.
12. Where a deed is made from a father to a son, in trust for the son's children on payment of a valuable consideration by the son, equity will regard the consideration paid as a settlement by the father upon the children, and will support the trust, and for this purpose will, if necessary, construe the deed as a covenant on the part of the son to stand seized to the uses of the children. *Caldwell v. Caldwell*, 553.
13. Such being the legal effect of the conveyance, parol evidence offered to show that a life estate was intended to be vested in the trustee for his own benefit, should be rejected as contradictory and subversive of the deed. *Ibid*.

**TRUSTEE.**

Money coming to a party only as a trustee, cannot be attached for his individual debt. *Adams v. Avery's Executors*, 77.

**UNITED STATES COURTS.—See PRACTICE.**

The courts of the United States receive the statutes and judicial precedents of the different states as evidence of the law of each state, without special plea or proofs of witnesses. *Evans v. The Cleveland and Pittsburg Railroad Company*, 483.

**VENDITIONI EXPONAS.—See SHERIFF'S SALE.**

**VIEWERS.—See ROADS.**

**WASTE.—See EQUITY, 12-16.**

**WILLS.**

1. Where a petition to the Register's Court to prove the contents and make probate of an alleged lost will was dismissed, and the administrator, previously appointed, made distribution of the personalty, and the heirs at law, by proceedings in the Orphans' Court, made partition of the real estate, and subsequently the alleged will was found—upon application made for its probate the only question for the Register's Court is the due execution of the paper produced, and its continued existence to the time of his death, as the last will and testament of the decedent. If the proofs are conclusive in the affirmative, probate will be granted, as of course. *Chamber's Estate*, 143.
2. The administrator in such case is protected in the administration by Act of 24th February, 1834, section 68. *Ibid.*
3. Our Acts of Assembly prescribe no time within which a will must be probated. *Ibid.*
4. A soldier at home on furlough cannot make a valid nuncupative will within the provision made in favor of soldiers in actual military service. *In re Smith's Will*, 548.
5. That exception applies only to soldiers engaged in the active duties of the field, on an expedition, in the temporary camp, on the march, in the battle or siege, and not to those at home or in permanent quarters. *Ibid.*

THE END.

















